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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 396

BERNARD GOLDFINE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

MILDRED PAPERMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners, Bernard Goldfine and Mildred Paperman,[1] pray that a writ of certiorari issue to review

[1] Petitioners were tried together, and pursuant to leave of court a consolidated record and brief was filed in the Court of Appeals. This petition is submitted in behalf of both petitioners.

judgments of the United States Court of Appeals for the First Circuit affirming judgments for criminal contempt by the United States District Court for the District of Massachusetts. Petitioner Goldfine was sentenced by the District Court to three months imprisonment and Petitioner Paperman to ten days imprisonment.

OPINIONS BELOW

The "Findings, Conclusions, and Opinion" of the District Court (Wyzanski, J.) are reported at 169 F. Supp. 93 and are reproduced in Appendix A of this petition. The opinion of the Court of Appeals is not yet reported; it is reprinted as Appendix B of this petition. A petition for rehearing was denied without opinion by the Court of Appeals (R. 626).[2]

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[2] A word about the record and citations to the record in this petition: The record certified to this Court by the Court of Appeals consists of three volumes. Volumes I and III contain the record of the proceedings in the District Court and Court of Appeals following filing of the petitions for criminal contempt. Volume II contains the proceedings prior thereto, commencing with the filing of a petition for enforcement of summonses issued by the Bureau of Internal Revenue. Volume II was the record in the appeal by petitioners from the District Court's order to produce, which was dismissed by the Court of Appeals for lack of jurisdiction: *Bernard Goldfine et al* v. *Fred G. Pastore*, 261 F. 2d 519 (1st Cir. 1958) (see p. 10, *infra*). Leave was granted to petitioners by the court below to incorporate in their appendix in this case the entire record appendix in No. 5439. For the convenience of the Court, we have filed nine copies of each of the three volumes of the record with the Clerk. In the certified record the pages of the three volumes have been renumbered seriatim; the nine sets filed with the Clerk have not been repaginated. The certified record is cited herein as R. ....; the nine copies lodged with the Clerk have been respectively numbered and are cited Vol. I ...., Vol. II ...., Vol. III ....).

JURISDICTION

The judgments of the Court of Appeals (Appendix B hereto; R. 623) were entered on July 24, 1959. A petition for rehearing was denied on August 14, 1959 (R. 626). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(i) 18 U.S.C. §§ 401, 402, 3691

(ii) Internal Revenue Code of 1954, 68A Stat. 854, as amended, 26 U.S.C. §7210

(iii) Internal Revenue Code of 1954, 68A Stat. 873, as amended, 26 U.S.C. §7402

(iv) Internal Revenue Code of 1954, 68A Stat. 901, 26 U.S.C. §7602

(v) Internal Revenue Code of 1954, 68A Stat. 902, as amended, 26 U.S.C. §7604

(vi) U.S. Const., Art. III, Fifth, and Sixth Amendments

The texts of the statutes involved are reproduced in Appendix C.

QUESTIONS PRESENTED

1. Whether a *prima facie* case of criminal contempt, which requires proof beyond a reasonable doubt that petitioners acted wilfully in disobeying an order of the District Court commanding production of a voluminous mass of records within about 48 hours, is established upon a mere showing (i) that petitioners had control over the documents; (ii) the documents were previously in existence; and (iii) petitioners voluntarily produced all but seven records which were delivered a few days later than the date set in the order.

there being no other evidence of intent to defy the court apart from the fact of delay with respect to these seven records?

2. Whether a court order was lawful with respect to the time required for performance, and whether petitioners could be held guilty of criminal contempt for delay in compliance, where such order was served on petitioners on a Saturday morning and required them to deliver to the Internal Revenue Service in Boston, Massachusetts, by noon of the following Monday the books and records of five corporations having a total weight in excess of 1,600 pounds, most of which were located in Boston, Massachusetts, but some of which were located in Concord, New Hampshire, in Montpelier, Vermont, and in Plymouth, Massachusetts?

3. Whether petitioners had, or could have had, a fair trial consistently with due process where the judge, trying them for criminal contempt for wilfully disobeying his own order, admitted on the record that because of his personal experience with the petitioners in different and unrelated litigation he had a previously formed opinion that they fell in a class of persons who are prone to wilful disobedience of court orders?

4. Whether the supervisory power of this Court over criminal contempt proceedings should be invoked to set aside a conviction by a trial judge who was sitting in judgment on the issue of defiance of his own order and who, at the same time (as he admitted on the record), had been involved previously in a nationally publicized dispute between himself and petitioner Goldfine in which the judge had impugned the integrity and veracity of the petitioner and the petitioner had impugned the integrity and veracity of the judge?

5. Where the documents required to be delivered by a court order have been delivered and the only issue is whether petitioners are guilty of criminal contempt with respect to the time, place, and manner of production, may the trial court, in determining whether petitioners are guilty of wilful defiance of its order, disregard representations by counsel in open court that he, rather than petitioners, was responsible for the time, place and manner of compliance?

6. Whether in a prosecution for criminal contempt for wilful disobedience of a court order under Section 401 of Title 18, U.S.C., petitioners were entitled to indictment by a grand jury and trial by a petit jury under Article III and the Fifth and Sixth Amendments to the Constitution where the conduct deemed to constitute a contempt was also punishable as a substantive crime?

STATEMENT OF THE CASE

Introductory

The facts which we deem controlling and which are discussed in detail below are these:

(i) Petitioners were ordered by the District Court to produce within about forty-eight hours, including Saturday and Sunday, a voluminous mass of documents located in four different cities and in the possession of five different corporations.

(ii) Petitioners began to perform the order within the short time set and continued performance with such rapidity that within eight days the order had been complied with and all of the documents, which weighed over 1600 pounds, had been delivered.

(iii) Two days after the time for performance, and while performance was continuously going on, peti-

tioners were charged with criminal contempt and wilful defiance of the court.

(iv) The trial commenced six days after the filing of the petition for contempt. Petitioners were adjudged guilty of criminal contempt for their delay in producing seven records. Prior to the hearing the seven records, on which petitioners' conviction is based, had already been brought to court for the purpose of compliance.

(v) Petitioners' trial counsel informed the District Court that the time and manner of presentation of these seven records in compliance with the order was his own responsibility and not that of petitioners.

(vi) In determining the gravity of the offense the District Judge relied upon a previously formed adverse opinion as to petitioners' character which he had obtained from personal experience with them in two other cases in which he said that Petitioner Goldfine had been on the verge of contempt without actually committing it.

(vii) The District Judge noted that he and petitioner Goldfine had been engaged in a nationally publicized dispute in which, in the view of the District Judge, petitioner had acted improperly and had impugned the veracity of the District Judge.

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1. On December 3, 1958, the Internal Revenue Service filed a Petition for Enforcement of Internal Revenue Summons under Sections 7604 and 7402 of the Internal Revenue Code of 1954 (26 U.S.C.) in the United States District Court for the District of Massachusetts (Vol. II, 6). This petition sought enforcement of six administrative summonses of the Internal

Revenue Service served upon petitioners in July and August, 1958. Four of the summonses were addressed to petitioner Goldfine as Treasurer of Lebanon Woolen Mills Corporation, as Treasurer of Lebandale Mills, Inc., as President of George Mabbett & Sons Company, and as President and Treasurer of Strathmore Woolen Company; and two were addressed to petitioner Paperman as Chief Accounting Officer of Northfield Mills, Inc. (Vol. II, 17-19, 30-38).

The petition for enforcement alleged that on August 1, 1958, some of the books and records covered by the summonses had been made available for examination by Internal Revenue agents at the offices of the corporations; that such examination had been suspended at the request of counsel for the corporations, and exclusive access to the books and records had been granted to the corporations for the period from August 27, 1958 to October 27, 1958, for the preparation of necessary Federal income tax returns; that an extension of such period had been requested by counsel for the corporations on October 24, 1958, and refused by the Regional Commissioner on October 28, 1958; that on October 31, 1958, counsel for the corporations appealed from the refusal of such extension to the Commissioner of Internal Revenue and such appeal was denied by the Commissioner on November 25, 1958; and that on November 5, 1958, *while said appeal was pending*, formal demand for the books and records was made upon petitioners and refused by them (Vol. II, 6 *et seq.*).

2. Upon the filing of the petition for enforcement on December 3, 1958, District Judge Wyzanski entered an order to show cause against petitioners returnable two

days later, at 10:00 a.m., December 5, 1958.[3] (Vol. II, 40-41). This order was served on petitioner Goldfine at 7:55 p.m. December 3, 1958, and on petitioner Paperman at 7:59 a.m. December 4, 1958, at their respective last and usual places of abode (Vol. II, 41). Counsel for petitioners received telephone notice of the hearing at about 4:50 p.m. December 3, 1958 (Vol. II, 44). No answer to the order to show cause was filed by petitioners (Vol. II, 43).

3. Thereafter, on Friday, December 5, 1958, a hearing on the order to show cause was held before Judge Wyzanski (Vol. II, 43 *et seq*). At this hearing counsel for petitioners complained that they had not had sufficient time to prepare the case and requested an opportunity to prepare an answer and file a brief (Vol. II, 44, 50). This request was denied although no objection was interposed by the government. At the conclusion of the hearing Judge Wyzanski entered orally "an effective order, an order from the bench" (Vol. II, 99), which was reduced to writing and designated as an "Interim Order" (Vol. I, 309). The Interim Order was signed at the close of a further hearing held at 4:30 p.m. on the same day (Vol. II, 110).

The petitioners were not personally present at either of the hearings on December 5, 1958. They were in New York City on that date.[4] There is no evidence that either petitioners knew about the order until Saturday, December 6, 1958, when it was served upon them (Vol. I, 9, 17).

[3] The return date was so fixed by the court despite the statement of Government counsel that it was the uniform practice to give ten days notice (Vol. II, 5).

[4] See *Heddendorf v. Goldfine*, 167 F. Supp. 915, 927 (D. Mass. 1958).

The "Interim Order" required petitioners to produce by noon of Monday, December 8, 1958, at the office of the Internal Revenue Service, Boston, Massachusetts, the following books and records of each of the five corporations named above: the minute book, the general ledger, the accounts receivable ledger, the accounts payable ledger, the general journal, the cash receipts book, the cash disbursement book, the voucher register, the purchase book, the sales book, the duplicate deposit books, the cancelled checks, the check book stubs, and the supporting vouchers. Such books and records were to cover the following periods respectively: for Lebanon, the six calendar years 1952 through 1957; for Lebandale, the two fiscal years ended June 30 in 1956 and 1957; for Mabbett, the three fiscal years ended September 30 in 1955 through 1957; for Strathmore, the five calendar years 1953 through 1957; and for Northfield, the five fiscal years ended April 30 in 1953 through 1957 (Vol. II, 309-311).

While most of the required books and records were located in Boston, some were in Concord, New Hampshire, some in Montpelier, Vermont, and some in Plymouth, Massachusetts (Vol. I, 184, 328, 86). Furthermore, many of the documents were scattered through the files of the various corporations and had to be collected (Vol. I, 85, 90-91, 96). The aggregate weight of the books and records covered by the order exceeded 1613 pounds (Vol. I, 121-124).

4. On the same day on which the Interim Order was issued, Friday, December 5, 1958, petitioners filed a notice of appeal to the Court of Appeals from the Interim Order (Vol. II, 2, 102-103). At 4:30 p.m., the same day the order was issued, Judge Wyzanski denied a stay.

Petitioners appealed from the Interim Order to the Court of Appeals. That court stayed the order for only three hours, until 3:00 p.m., Monday, December 8, 1958 (Vol. I, 312). A further stay was denied on the ground that the Interim Order lacked finality (*Goldfine* v. *Pastore*, 261 F. 2d 519 (1st Cir. 1958)); and subsequently the appeal was dismissed for lack of jurisdiction (App. B, 16a).

5. On Monday, December 8, 1958, shortly after the stay expired at 3:00 p.m., petitioners began to deliver documents to the Internal Revenue Service in compliance with the Interim Order. A large number of books and records were collected and sent to the Internal Revenue office at that time, within about forty-eight hours after service of the order on Saturday, December 6, 1958 (Vol. I, 313-315, 317-318). Receipt of these records was duly acknowledged by the Internal Revenue Service (*Ibid*). From December 8 until December 18, 1958, when the contempt trial was concluded, continuous deliveries of these documents were made. During these ten days the record shows twenty receipts for such deliveries, or an average of two deliveries a day (Vol. I, 313-333). Up to December 17, 1958, 1613 pounds of documents had been delivered (Vol. I, 121-124).

6. Two days after this continuous stream of deliveries had commenced on Monday, December 8, and in the midst of production, at 3:00 p.m. on Wednesday, December 10, 1958, the United States Attorney filed Petitions for Attachment for Criminal Contempt alleging wilful disobedience of the Interim Order in violation of 18 U.S.C. §401. Petitioner Goldfine was charged in three counts, the first count charging him with

"wilfully failing and refusing to produce the books and records" of Lebanon, and the second and third counts charging similar offenses in respect of Lebandale and Mabbett respectively (Vol. I, 7 *et seq.*). Petitioner Paperman was charged in two counts with "wilfully failing and refusing to produce the books and records" of Strathmore and Northfield respectively. At the same time, the Government moved that petitioners be adjudged in civil contempt (Vol. I, 7).

The District Court set the case for trial six days later, on December 16, 1958, and directed that the criminal and civil contempt petitions should be tried simultaneously (Vol. I, 7).

7. Early in the contempt trial, the District Judge announced that he would not hold the petitioners guilty of contempt in respect of documents delivered at any time prior to the beginning of the contempt trial. As he put it (Vol. I, 77):

> "It would be most unlikely that I would punish for criminal contempt a failure to deliver on the 8th *if a delivery had taken place by now* [i.e., December 16]. What I am really interested in is, *what items called for have not yet been delivered.*" (emphasis supplied)[5]

The District Judge found that "there has been an enormous turnover of documents to the custody of the Internal Revenue [Service]" and that "indisputably * * * there has been a compliance of large magnitude"

[5] Before the District Judge made this comment, the seven records on which the contempt conviction was predicated, had already been brought into the courtroom; they were delivered there on the morning the trial commenced for the purpose of compliance (p. 15 *infra*).

(Vol. I, 31). The District Judge, however, held petitioners guilty of criminal contempt because of their delay in producing seven records, namely the accounts receivable and accounts payable ledgers of three of the five corporations, and a few cancelled checks of one of the corporations (Vol. I, 244-245). The District Judge predicated his finding of wilfulness on the mere facts that petitioners knew of the existence of the seven records and failed to produce them in time (Finding 32, Vol. I, 251). Petitioners produced the seven records but had not done so on the date the contempt charge was filed. He ruled that: "Failure to produce promptly such a known and readily reached record is wilful defiance" (Vol. I, 252).

Goldfine was found guilty on Count 1 of the petition for attachment for criminal contempt; he was found not guilty on Counts 2 and 3. Miss Paperman was found guilty on both counts. Goldfine was sentenced to three months imprisonment and Miss Paperman to ten days imprisonment. Motions by petitioners for a judgment of acquittal or alternatively for a new trial, and for reduction of sentence were denied (Vol. I, 277-283, 303). The District Court found that petitioners were not liable for civil contempt (Vol. I, 271).

8. The seven records upon which the convictions were predicated were produced in court by the petitioners themselves at the contempt trial; they were offered in evidence on the second day of the trial during the course of cross-examination of Internal Revenue agents; and they were delivered to the Internal Revenue Service the same day (See Finding 20, Vol. I, 249; Finding 31, Vol. I, 251). At the conclusion of the hearing it was apparent from the record that there had

been full compliance with the Interim Order except for the delay in producing the seven records. The District Judge in effect so recognized by dismissing the motions for civil contempt.

There was no evidence that the seven records were unique or of special importance as compared to the large number of documents previously produced by the petitioners. There was no evidence that the Internal Revenue Service assigned a higher priority to these seven documents than to others, or that time was of the essence with respect to production of these seven records. There was no evidence that the records contained incriminating data (compare *Nilva* v. *United States*, 352 U.S. 385).

The record shows that the seven records were produced in open court on the advice of petitioners' counsel and with the intent of complying with the Interim Order. As petitioners' trial counsel stated in presenting one of the seven records (Vol. I, 156):

> "The book which has been admitted in evidence *is offered by me as belated performance*, to be sure *but performance of the interim order*" (See also Vol. I, 158). (emphasis supplied)[6]

Petitioners' trial counsel informed the court that he had determined that production of these records should be made in this manner because there was a "problem"

[6] The Court of Appeals mistakenly found (App. B, 19a) that "When these documents were produced in court on December 18, it was for the avowed purpose of demonstrating to the court that they were current records in use by the corporations and that compliance with the interim order would make it impossible for the corporations to conduct their business." There is no evidence in the record to support this finding.

involving these records which he wished "to present to the Court a little later" (Vol. I, 154). He subsequently explained that he had produced them in open court because the documents contained irrelevant matter outside the scope of the Interim Order, and he desired to elicit a suggestion from the court with respect to the appropriate method of compliance in these circumstances (see Vol. I, 156-157, 202-204). The District Judge refused to offer any suggestion for compliance, stating that "There is no method of offering to the Court anything in compliance with the interim order" (Vol. I, 156).

Petitioners' trial counsel repeatedly advised the court that the time, place, and manner of production of the seven records had been determined by him. Petitioners, he said, relied "on the advice of counsel" (Vol. I, 203). He further said, "'[W]hat I am suggesting to your Honor is, that in the circumstances that appear here, with counsel wrongly bringing something to Post Office Square [i.e., to the Court] that should have been brought to 55 Tremont Street, [the Internal Revenue Service Boston office]—that there is no evidence of wilfulness or, if you like, in the alternative, the finding of wilfulness is against the weight of the evidence." (Vol. I, 289.)

The Government did not interpose any objection to trial counsel's representations. It did not offer any contradictory evidence, and no suggestion was made in oral argument that these statements were not true. The District Court, however, refused to assign any weight to the representations that petitioners had acted upon the advice of counsel on the ground that there was no sworn testimony to that effect. It dismissed the representations as an "argumentative thrust" (Vol. I, 250).

After the opinion had been filed by the Court of Appeals affirming the convictions, petitioners sought leave to file with the Court of Appeals an affidavit of trial counsel, an eminent member of the Boston bar, in support of a petition for rehearing (R. 624). Trial counsel stated in the affidavit that, on the day before the contempt trial, a question had arisen concerning the method of compliance with respect to six of the seven records because they "contained irrelevant material not called for by the Interim Order", that "I decided to bring the documents to court in order to obtain a suggestion from the court how to eliminate the irrelevant matters", and that the "documents were in fact brought to court at about 9:35 a.m. on December 16", the morning on which the contempt trial commenced (R. 625).

The fact that the six records were actually brought to court on the first morning of the trial was not called to the attention of the trial court. If the District Court had adhered to its view that petitioners would not be guilty of contempt if documents were produced before the trial, p. 11 *supra*, petitioners presumably would have been found not guilty. The prayer by petitioners in their petition for rehearing in the Court of Appeals that the case be remanded for findings on this issue was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Importance of the Issues

This petition raises fundamental questions respecting the exercise of the criminal contempt power by the federal courts. The questions relate (i) to the burden of proof which the prosecution must discharge before punishment can be imposed for delay in complying with

an order requiring the production of an enormous quantity of documents in a very short time; (ii) to the permissible scope and conditions of an order to produce books and records on pain of criminal contempt; (iii) to the principle that a judge presiding in a criminal contempt proceeding should not rely, in weighing the gravity of petitioners' alleged defiance of his order, upon personal experience with petitioners in different and unrelated proceedings from which the judge derived an unfavorable impression of their attitudes toward him; (iv) to the principle that a judge who has been embroiled in an acrimonious public controversy with the accused should not sit in judgment in a case involving a charge that the accused has defied his orders; (v) and to the far-reaching constitutional issue of the right of a party charged with criminal contempt to indictment by a grand jury and trial by a petit jury where the underlying conduct deemed to constitute contempt is also punishable as a substantive crime.

The Court of Appeals has decided issues of major importance in the administration of the contempt power. Because of the very nature of contempt proceedings, the supervisory powers of this Court over the fair administration of criminal justice in the federal courts are frequently exercised to prevent abuse of this power. This Court has emphasized that "the district courts have a special duty to exercise such an extraordinary power [as the criminal contempt power] with the utmost sense of responsibility and circumspection" and that "appellate courts have here a special responsibility for determining that the power is not abused." *Green* v. *United States*, 356 U.S. 165, 188.

Because the customary procedure in trials for criminal contempt is anomalous in our system of trial

by jury, the avenues to review by this Court must be kept open, even in cases where criminal convictions following trial by jury would not be reviewed. The current prevalence of Congressional investigations has been the occasion for invoking the aid of this Court in supervising the use of contempt powers to compel a response to legislative inquiries. The growth of administrative agencies has been accompanied by an increasing resort to the federal courts to enforce administrative subpoenas with the sanctions of criminal contempt. Dangers of the arbitrary use of these powers are constantly present and can only be avoided by the vigilant supervision of this Court.

Thus it is a matter of importance to every custodian of corporate records for this Court to determine whether a Federal District Court may punish for criminal contempt because of a slight delay in obeying its order to produce corporate records, entered at the behest of the Internal Revenue Service, which has the broad scope and brief time for compliance of the present order. Equally important is the issue whether a *prima facie* case of wilful violation of such an order is proved merely by showing that persons having control of all existing documents covered by the order had produced out of time a few of the numerous books and records covered by the order without any other evidence of wilfulness. Conviction for criminal contempt for violation of a court order by the judge who entered the order where, as here, the trial judge has been personally so involved with the alleged contemnor to such an extent that strict impartiality on his part is subject to doubt, casts a shadow upon the integrity of our judicial system. Finally, where the underlying conduct constitutes a violation of a fed-

eral penal statute with a right to trial by jury, there is a serious and substantial issue whether that right can be denied by resort to the contempt power.

The Issues Presented

I

The Government's Burden of Proof on the Issue of Wilfulness

The Court of Appeals held in substance that a *prima facie* case of criminal contempt is established upon a mere showing that petitioners, who had control of documents, delivered them at a date later than the date fixed by a court order directing production. We submit that this ruling offends the presumption of innocence and relieves the prosecution from the burden of proving beyond a reasonable doubt that the accused intended to defy the court.

The Court of Appeals stated (App. B, 18a-19a):

> "It is enough to make out a prima facie case for the government to show, as the government did below, that the appellants, in response to the interim court order calling for the production of corporation records, refused to surrender them when they were in existence and within their control. See *Nilva* v. *United States*, 352 U.S. 385, 392 (1957)."

This is, indeed, the rule stated in the *Nilva* case. But it has no application to the present case. There was no evidence in the present case that petitioners "refused" to deliver the documents in question. There was no proof that petitioners were adamant or defiant. To the contrary, all of the records required to be produced by

the Interim Order were offered in court in response to the order and were in fact delivered to the Internal Revenue Service.

The District Court found petitioners guilty of contempt not because of "refusal" to comply but solely because of their delay in turning over seven records. These records, as we have pointed out, were in the courtroom prior to the commencement of the trial, and they were turned over to the Internal Revenue Service on the second day of the trial, p. 15, *supra*. There was no proof that the seven records were unique or that they were in any respect more significant than the voluminous records previously turned over by the petitioners.

Thus a critical question is presented as to the quantum of proof necessary to establish a *prima facie* case of criminal contempt with respect to a court order to produce corporate records. Surely, in the present case, mere proof that the documents were in existence and within the control of petitioners and that there was a delay in delivery does not establish a wilful failure or refusal to deliver them, especially in the light of the scope of the Interim Order and the brief time allowed for compliance. Nor does such proof properly amount to a *prima facie* case so as to compel petitioners to prove lack of wilfulness. In order to prove the element of wilfulness it was incumbent upon the Government to present convincing evidence that petitioners made a "deliberate and intentional" decision not to obey the court's command. *Flaxer* v. *United States*, 358 U.S. 147, 151.[7]

[7] The necessity of proving wilfulness was emphasized in *In re Wegman*, 40 App. Div. 632, 57 N. Y. Supp. 987 (1899), involving

Mere proof of delay does not constitute proof of wilful disobedience. Where an order to produce is complied with, the proof that the compliance is late does not even create an inference of defiance of the court unless special aggravating circumstances are shown. A delay of eight days in producing seven documents (not shown to be of particular importance) out of a total of approximately 1600 pounds of material which petitioners had been continuously supplying does not support even an inference that the purpose of the delay must have been to defy the court. The District Judge found that "indisputably * * * there has been a compliance of large magnitude" (Vol. I, 31).

We need not speculate as to the kind of evidence that might be produced to prove wilfulness. It was the burden of the Government to produce such evidence, however difficult its task might be. Cf. *Maggio* v. *Zeitz*, 333 U.S. 56, 64 (1948). It may not require petitioners to establish their innocence where the prosecution has failed to produce evidence, direct or circumstantial, that petitioners intended to defy the court. Such a "drastic shifting of the burden of proof in a criminal case" should not be countenanced by this Court. See *United States* v. *Patterson*, 219 F. 2d 659, 661 (2nd Cir. 1955).

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facts similar to the present case except that in that case there was no proof of control of the book in question. The Court stated:

> "Before he could be deprived of his liberty, the fact that he had *willfully* disobeyed the order of the court must be clearly established. The fact could not be left to inference or conjecture. The proof must show beyond a reasonable doubt that he had *willfully* refused to do what the court directed." (40 App. Div. at 633) (emphasis supplied)

If the rule of law, applied by the trial court and affirmed by the Court of Appeals, that delay itself is *ipso facto* contumacious, is sustained here, the doctrine that "In criminal contempts, as in criminal cases, the presumption of innocence obtains", and that "proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself" (*Michaelson* v. *United States ex rel Chicago, St. P., M. & O. Ry Co.*, 266 U.S. 42, 66) will be subverted. See also *Flaxer* v. *United States*, 358 U.S. 147, 151. Not only would the prosecution be relieved from its traditional responsibility, but the petitioner would be forced to forego his basic right to remain silent. The far-reaching consequences of this harsh test of wilfulness are appropriate for consideration by this Court in the exercise of its supervisory powers.

II

Illegality of the Interim Order

Petitioners could be pronounced guilty of contempt only if the "Interim Order" were a "lawful * * * order" within the meaning of 18 U.S.C. § 401.[8] We submit that in light of the tremendous quantity of documents called for the provision in the Interim Order respecting time for compliance was unreasonable, that the Interim Order was therefore unlawful, and that petitioners accordingly cannot be punished for contempt because of a short delay in compliance.

The record shows that petitioners were given about 48 hours, including Sunday and part of Saturday, for

[8] See *Green* v. *United States*, 356 U.S. 165, 169: "[T]he order here issued was beyond dispute 'lawful' * * *".

delivery of the great mass of documents required by the order. The Interim Order was first entered orally as "an effective order, an order from the bench" at the conclusion of a hearing which presumably commenced at 10 A.M., Friday, December 5, 1958 (Vol. II, 41, 99). The written order was signed at a hearing that commenced at 4:30 P.M., later the same day (Vol. II, 103, 110). There is no evidence that either of the petitioners knew of the order prior to Saturday, December 6, 1958, when it was served upon them (Vol. II, 2, Vol. II, 112). The time allowed for compliance must be reckoned from that date. Compliance with the court order was commanded by its terms by noon on Monday, December 8, 1958 (Vol. I, 309-311). This time was extended by the Court of Appeals until 3 P.M. of the same day (Vol. I, 312).

The record does not show that there was any necessity whatever for such haste. The government did not request hurried delivery; indeed, government counsel told the District Judge when the petition for enforcement was filed that it was "uniform practice" to allow respondents ten days to answer an order to show cause. (Vol. II, 5). The question this presented is whether a district court can require production of the vast mass of records involved here within the brief time allowed, without some showing that speed is essential, and then convict parties of criminal contempt for delay in compliance. Unless some limits are placed upon the judicial subpoena power, any person under investigation by a federal administrative agency can be subjected to a court order "which creates a duty impossible of performance, so that punishment can follow". *Maggio* v. *Zeitz*, 333 U.S. 56, 64.

This issue was bypassed by the courts below. In substance, both of the lower courts regarded the case

as if the Interim Order merely required the production of seven records. During the trial the District Court repeatedly disclaimed any interest in the amount of documents already delivered (Vol. I, 63-64, 69, 189-190). But if it was impossible in the present case to produce all of the records in time, as we contend, petitioners would inevitably have produced some of them late. And the last documents produced, under the rulings of the courts below, would serve as the basis of a conviction for contempt.

III

Fairness of Trial by Judge Wyzanski—His Unfavorable Opinions Concerning Petitioners Derived from Prior Unrelated Cases

A substantial question meriting review by this Court arises from the fact that the District Judge, in determining the gravity of the offense, relied upon unfavorable impressions of petitioners derived by him from unrelated cases. Judge Wyzanski, who entered the Interim Order to produce and presided over the contempt trial, had had previous judicial experience with petitioners. At the sentencing, Judge Wyzanski stated to Petitioner Goldfine:

> "In a case before me a company in which you are interested was fined $20,000 for a contempt and you yourself were charged with the contempt, although for reasons which satisfied me at the time I thought you personally ought not to be fined." (Vol. I, 263).

At the same time, the trial judge referred to Petitioner Goldfine's experience with the problem of contempt before a Congressional Committee (Vol. I, 264).

He then referred to an incident in another case, *Heddendorf* v. *Goldfine*, 167 F. Supp. 915 (D. Mass. 1958), in which he had sat, as follows:

> "But here we have a case where in the most explicit terms, on the very day when you chose not to fulfill your commitment in an earlier case, I warned you that if you did not comply with the order of this Court you would suffer the penalties of criminal and civil contempt, if they were applicable." (Vol. I, 264).

Judge Wyzanski concluded:

> "*You thus fall into a class of persons experienced with this type of procedure, on the verge, if not over the verge, of defiance on a number of previous occasions.*" (Vol. I, 264) (emphasis supplied).

With respect to Petitioner Paperman, Judge Wyzanski stated, when imposing sentence on her:

> "But your association with all the previous litigation to which I have referred has been so intimate that I must say you, also, are both a woman of experience and deliberate defiance." (R. 266).

These expressed opinions of Judge Wyzanski, amounting to nothing less than a conviction that petitioners fall into a class of persons who are prone to wilful disobedience of court orders, raise the important question whether a judge having such opinions can fairly try a case involving criminal contempt charges for alleged wilful disobedience of his own order. We submit that this Court should determine whether a trial in such circumstances is repugnant to the basic requirements of due process.

Trial for criminal contempt for alleged disobedience of a court order by the judge who entered the order has been a matter of concern to this Court. True it is that such trials were sanctioned in *Green* v. *United States*, 356 U.S. 165, and *Nilva* v. *United States*, 352 U.S. 385. But each of these cases was a "dubious pronouncement of a gravely divided Court . . ." (*Cooper* v. *Aaron*, 358 U.S. 1, 27, concurring opinion of Mr. Justice Frankfurter), and in both cases vigorous dissents were written. This Court should not sanction a trial by the judge who entered the order and who had a preconceived adverse opinion concerning the character of the alleged contemnors.[9]

The Court of Appeals disposed of the contention that Judge Wyzanski should not have acted in this case principally on two grounds: first, that petitioners knew of the prior litigations before to the contempt trial and did not move to disqualify Judge Wyzanski; and, second, that the only evidence of Judge Wyzanski's opinions concerning petitioners was his remarks at their sentencing and that such remarks, "read in context, cannot serve as the basis for any charge of prejudice." (App. B, 22a)

Since the opinions of Judge Wyzanski were expressed at the sentencing, they could not have served as a basis for disqualification at, or prior to, the trial. Under such circumstances the issue was properly raised for the first time in the Court of Appeals. *Knapp* v.

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[9] Serious doubts have been expressed even as to the propriety of punishment by a judge for contempt committed in his presence where the record indicated that he was not impartial to the accused. *Sacher* v. *United States*, 343 U.S. 1, 14, 23, 89 (dissenting opinions of Justices Frankfurter, Black, and Douglas).

Kinsey, 235 F. 2d 129, 131 (6th Cir. 1956), *cert.* denied, 352 U.S. 892.

Moreover, we are not dealing with the question of disqualification of a judge in an ordinary case. Here, the trial judge was adjudicating issues of the reasonableness of his own order and the wilfulness of petitioners in alleged disobedience of that order. A fair trial of such issues is jeopardized by much less substantial factors than would be required to support a claim of prejudice in other cases.

Finally, the suggestion that the remarks of Judge Wyzanski at the sentencing are harmless when read in their context is unjustified. The opinion that petitioners fall into a class of persons who are prone to wilful disobedience of court orders, carried over from litigation prior to the contempt trial, was obviously in the mind of the judge during the trial as well as at the sentencing. The District Judge thus approached the critical issue of intent in a criminal case with a presumption against petitioners.

If a trial judge can dispose "of matters before him in reliance upon his personal recollection of what transpired in the trial of a cause before him" (*Ladner v. United States*, 230 F. 2d 726, 727 (5th Cir. 1956), rev'd on other grounds, 358 U.S. 169) there is serious danger that the defendant will be deprived of an effective opportunity to show on the record that the judge's appraisal was erroneous. In the present case, the two instances to which the trial judge referred as indicating that petitioners were prone to disobedience, might well appear in an entirely different light to another judge, particularly if the petitioner had an opportunity to

offer evidence in support of his version. We have briefly summarized the pertinent facts in the margin, and we respectfully submit that they indicate there was no basis for the trial judge's assertion.[10]

[10] (a) The trial judge asserted (Vol. I, 264) that Goldfine had "chos[n] not to fulfill * * * [his] commitment in an earlier case," namely *Heddendorf* v. *Goldfine*, 167 F. Supp. 915 (D. Mass. 1958). A proposal for settlement of a derivative stockholder's suit had been presented to the District Court for its approval under Rule 23(c), F.R.C.P. (167 F. Supp. at 917). No one opposed the settlement; all the parties and others approved it (167 F. Supp. at 927). Judge Wyzanski nevertheless withheld his approval of the settlement until Goldfine filed a sworn statement respecting the purchase of cashier's checks by one or both of the corporations involved (*Id.* at 925-926). The court recognized that its only sanction if Goldfine chose not to file the affidavit was the withholding of its approval of the compromise (*Id.* at 926). Goldfine's counsel "had made a representation or something close thereto" that Goldfine was "fogbound in New York [and] it would be difficult to get the draft approved in final form and executed by Goldfine on that day" (167 F. Supp. at 927). Goldfine, however, never committed himself to signing the statement (see *Id.* at 927). Goldfine chose not to sign the statement, and thereby, to incur the risk that the statement would not be approved (*Ibid.*). In short, he exercised a legal privilege, and in no way repudiated any "commitment" by him to the court. Subsequently, the District Court approved the settlement as "fair" and "generous," even though Goldfine did not execute the affidavit (167 F. Supp. at 928).

(b) In the second situation to which the court alluded, a $20,000 fine for criminal contempt had been imposed against a corporation, but Judge Wyzanski himself exonerated Goldfine because "there was no absolute showing that Mr. Goldfine personally was a person so in charge of the records as to be held accountable for failure to produce them." (Vol. I, 291-292.)

IV

Fairness of Trial by Judge Wyzanski—His Personal Public Dispute with Petitioner Goldfine

The District Judge and Petitioner Goldfine had been embroiled several months before the contempt trial in a public dispute. The controversy received nationwide publicity. Goldfine was questioned about the matter before a congressional committee. The Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce. We have set out the relevant excerpts from the transcript of testimony before the Committee as Exhibit 1, attached to this petition.

The publicized facts concerning the controversy were these: In November, 1957, Goldfine and his wife had received an invitation to a charity benefit in Boston. The invitation to Goldfine was signed by Judge Wyzanski's wife, who was chairman of the fund raising event. Goldfine attended the benefit and pledged a contribution of $1,000. According to a newspaper account, "After the words 'secured by' on the [pledge] card, Mr. Goldfine had written the name of the judge's wife. Mrs. Wyzanski was the chairman of the fund-raising event at which the pledge was made. * * * The next day [i.e., the day following the benefit] Mr. Goldfine called our office [i.e., the American-Israel Culture Foundation] to correct the impression created by filling in Mrs. Wyzanski's name. He said that he didn't quite know what to put down and, seeing her listed as chairman, wrote in her name. He explained that the gift was not given in her honor." *The New York Times*, June 19, 1958, p. 22, col. 6.

A derivative stockholder's suit in which Goldfine was defendant was pending at the time before Judge Wyzanski. *Heddendorf v. Goldfine*, 167 F. Supp. 915 (D. Mass. 1958). Immediately following the incident at the benefit, Judge Wyzanski issued "an unusual personal comment from the bench" (Exhibit 1, p. 2) in which he stated as follows:

> "The COURT. A, to me, entirely unprecedented and rather disagreeable incident happened in connection with this case, and I feel bound to state it. I have already made a full disclosure of this matter to the Chief Judge and other Judges of this Circuit.
>
> So far as I know, previous to Sunday I have never seen Mr. Bernard Goldfine. So far as she knows, my wife had never previously seen Mr. Goldfine.
>
> A charity with which my wife is connected and with which I have no connection, not even as a donor, was having a benefit on Sunday evening. Mr. Goldfine, in Mrs. Wyzanski's presence and mine, made a gift to that charity which he asked the recipient of the gift — that is to say, the solicitor who received the subscription — to say he was making it in honor of Mrs. Wyzanski.
>
> I am not clear whether Mr. Goldfine appreciated the full significance of what he was doing, and I do not know whether he had it in the back of his mind that one of the effects of such action might be to make me consider whether I should disqualify myself in the case. Whatever may have been his object, I have stated the facts, and I am sitting on the case." (Transcript of proceedings, *Heddendorf v. Goldfine*, C.A. No. 56-356, (D. Mass.), November 27, 1957).

In July 1958, during congressional committee hearings, Goldfine was interrogated *inter alia* concerning the circumstances of this charitable contribution. Goldfine denied that the contribution was "given in honor of Mrs. Wyzanski" (Ex. 1, p. 4). An excerpt from the foregoing statement by Judge Wyzanski was read to Goldfine, and he was asked, "Did Judge Wyzanski make that statement?" Goldfine answered: "He probably did, but we knew the facts. It was a horse of another color * * * The judge didn't know that Mrs. Wyzanski had given us a personal invitation." (Exhibit 1, p. 5).

In sentencing Goldfine for contempt in the present case, Judge Wyzanski stated with reference to Goldfine's testimony before the Congressional committee (Vol. I, 294):

> "I closed my eyes to a statement he made flatly contradicting this Court's remark of somewhat over a year ago as to the circumstances under which a certain gift was made—a statement he made flatly contradicting as false the statement this Court made. I ignored it, and I do ignore it."

This case thus presents the extraordinary spectacle of a judge sitting in judgment over a party with whom he has been previously involved in an acrimonious and nationally publicized dispute. As the foregoing remarks indicate, Judge Wyzanski felt that Goldfine had impugned his veracity in his testimony before the House Committee. The merits of this controversy are, of course, beside the point. But there can be no dispute that the trial judge was personally deeply enmeshed in this incident. Whatever the merits, Judge Wyzanski must have sincerely felt a sense of righteous indignation at petitioner Goldfine, who, he believed, had accused him before a nationwide audience of making false

statements in a matter which was receiving front-page headlines over the entire country. In these circumstances, we respectfully submit that Judge Wyzanski should not have presided in the present case, and that the supervisory powers of this Court should be exercised to set aside his judgment. See *Sacher* v. *United States*, 343 U.S. 1 (dissenting opinions by Justices Frankfurter, Black and Douglas). It is important, as Lord Chief Justice Goddard observed, that "justice must not only be done but must manifestly be seen to be done" (*Rex* v. *Bodmin JJ.* [1947] 1 K.B. 321, 325). Certainly a conviction by a judge who is indignant against a party on account of a personal grievance does not have the appearance of justice.

The Court of Appeals noted that petitioners did not file a motion asking Judge Wyzanski to disqualify himself. The question arises therefore whether, in the absence of an affidavit of personal bias, Judge Wyzanski was entitled to sit when he himself stated upon the record that petitioner Goldfine had accused him of making false statements. We submit that where a judge has a personal grievance of such magnitude it becomes his duty *sua sponte* to excuse himself rather than to put the burden on the defendant and his counsel of adding insult to injury by moving to disqualify the judge because of bias. No attorney who practices before a judge likes to file an affidavit that the judge cannot impartially decide a case where he knows the judge is of a contrary opinion, as Judge Wyzanski was in this case. Judge Wyzanski himself would have been required to pass on a motion to disqualify, and it is clear, from his remarks in this case, that he felt he was not biased (see Vol. I, 302), so that the motion would in any event have been futile. Particularly in a case involving a charge that a defendant has defied his order, the judge should

recognize himself that whether or not he thinks he can disregard his grievance, it will not give the appearance of justice if he sits.

V

Trial Counsel's Representations That He Determined the Time, Place and Manner of Production Should Have Been Considered

It is incontrovertible that the time, place, and manner of production of the seven records was determined by petitioners' trial counsel. Petitioners produced the documents in open court in reliance upon counsel's advice. The Court of Appeals recognized that delay in production "due to the advice of counsel * * * might negate wilfulness" (App. B, 19a), but it held that there was no testimony under oath to this effect. The courts below refused for this reason to assign any significance to trial counsel's representations.[11]

We submit that the courts below erred in refusing to give appropriate weight to these representations, and that, at the very least, the statements created a reasonable doubt that petitioners intended to defy the court.

The prosecution did not object to the representations. It did not request an opportunity to cross-examine counsel. In the absence of objection, the general practice is that counsel's statement concerning his own conduct of a case is accepted by the court without requiring him to assume the inconsistent position of a witness in the very case which he is trying. The trial judge in this case elicited representations of

[11] The District Judge did not indicate any disbelief in trial counsel's statements. Indeed, the trial judge indicated that he had a "very high regard" for defense counsel (Vol. I, 298).

counsel as to material facts and he made rulings on the faith of these representations (see e.g., Vol. II, 52-53, 109). It is obvious that it would be impossible effectively to administer justice if the courts could not rely with confidence upon representations by counsel. Statements by trial counsel in the conduct of a trial differ from statements of ordinary witnesses. Counsel is an officer of the court. Even when not under oath, he is bound not to make misrepresentations to the court. The court can hold him in contempt if his statements are not true. And, as the trial judge noted in this case in pressing for an answer to an inquiry by him (Vol. II, 109): "You are here as counsel. Look. You don't evade questions as counsel any more than you do as witness. Answer it."

Trial counsel here assumed full responsibility for the manner in which the seven records were produced. And it was logical that he should do so, for the matter involved technical procedural considerations. A statement which counsel sincerely believes exculpates his client from having wilfully disobeyed a court's order and which puts the responsibility on himself for an error certainly cannot be ignored on the ground that counsel did not volunteer to take the stand in a case in which he was trying.

But even under strict rules of evidence, the statement of trial counsel that it was his fault that the records were produced as they were should have been considered. There was no objection, and in the absence of objection there is a duty to consider and to give probative effect even to hearsay. *Diaz v. United States*, 223 U.S. 442; *United States v. Fleming*, 134 F. 2d 776, 778 (2nd Cir. 1943). Moreover, the representation of counsel was not objectionable since it was an admission against the interest of the maker, i.e., it was a con-

fession that counsel may have been mistaken in advising his client.

We recognize that it might not constitute a defense to a contempt charge if on advice of counsel documents were not delivered. Such a situation would involve deliberate refusal, and the person in possession of the documents would take a calculated risk. But where a defendant decides to comply, he cannot be said wilfully to defy the court if his counsel erroneously arranges for the details of compliance. A defendant cannot possibly know in that situation that his counsel's advice is erroneous.

The complexity of orders to produce in proceedings of this kind is so great that a rule of law equating counsel's advice on the technical manner of compliance with complete refusal would endanger every defendant who left the responsibility on counsel as to the time, manner and place of production. This question arises in countless cases. It is well known that defendants in obeying a complex subpoena rely on counsel as to technical details. It would spread endless confusion if counsel had to tell a defendant that he was not entitled to rely on counsel's advice on technical details which defendant does not understand.

VI

Petitioners Were Entitled to Indictment by Grand Jury and Trial by Petit Jury

The petitions for enforcement of the Internal Revenue summonses, which resulted in the entry of the Interim Order to produce, alleged that petitioners had refused to obey those summonses (Vol. II, 6 *et seq.*; see 26 U.S.C., §§ 7402, 7604). Failure to obey such a summons is a criminal offense, punishable by fine and

imprisonment (26 U.S.C. 7210). "[P]resumably a conviction of this offense could only be had upon a regular criminal prosecution, with the right of trial by jury." *Brody* v. *United States*, 243 F. 2d 378, 381 (1st Cir. 1957).

Instead of directly prosecuting petitioners under 26 U.S.C. §7210 for failure to comply with an administrative summons, the Internal Revenue Service procured a court order directing production of the records, and it then instituted contempt proceedings for violation of the order. The contempt power was thus invoked to punish conduct declared by statute to be a criminal offense. By this stratagem, the government sought to circumvent a jury trial. To be sure, petitioners were convicted for disobedience of a judicial order, and not for non-compliance with an administrative summons. But the form of the proceeding below should not be permitted to obscure the fact that the substance of the alleged contempt was the same as the conduct proscribed by 26 U.S.C. §7210, namely, failure to turn over requested records to the Internal Revenue Service.

The Internal Revenue Service was not content with invoking the civil contempt power of the District Court under 26 U.S.C. §§7402 and 7604 (Appendix C, attached hereto) to compel production of the books and records; the I.R.S. also invoked the criminal contempt power for the purpose of punishing petitioners. Section 7604(b) vests jurisdiction in the District Court "to enforce obedience to the requirements of the [Internal Revenue] summons and to punish such person for his default or disobedience." To construe this provision as giving the court power to "punish" without a jury trial would raise grave doubts as to its constitutionality.

Article III of the Constitution commands that "The trial of *all* crimes, except in cases of impeachment, shall be by jury", and the Sixth Amendment likewise guarantees that "In *all* criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury" (emphasis supplied). We submit that the criminal contempt proceedings in the District Court deprived petitioners of their constitutional right to trial by jury under Article III and the Sixth Amendment, and to indictment by a grand jury under the Fifth Amendment, for the reasons stated by Mr. Justice Black dissenting in *Green* v. *United States*, 356 U.S. 165, 193 (Warren, C. J., and Douglas, J., concurring).

This Court has not yet decided whether there is a right to grand jury indictment and trial by jury in a criminal contempt proceeding under 18 U.S.C. §401(3) where the underlying conduct constituting the alleged contempt is also in violation of a criminal statute. That question was not resolved in *Green* v. *United States*, *supra*. The contumacious conduct in that case, bail jumping, was not then a criminal offense, and this court explicitly noted that "considerations in past decisions limiting the scope of the contempt power where the conduct deemed to constitute a contempt was also punishable as a substantive crime are not here relevant." 356 U.S. at 173.[12]

[12] Sections 402 and 3691 of Title 18 provide for trial by jury if the alleged disobedience of a court order is "also a criminal offense under any statute of the United States," but actions brought by or on behalf of the United States are excluded.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated:
September 11, 1959

EXHIBIT 1

HOUSE OF REPRESENTATIVES, U. S.

REPORT OF PROCEEDINGS
(Unprinted Transcript, Vol. 31)

Hearing held before
Special Subcommittee on Legislative Oversight of the
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
FEDERAL TRADE COMMISSION AND SECURITIES AND
EXCHANGE COMMISSION MATTERS

Washington, D. C.
July 17, 1958

. . . . . .

Mr. Bennett: . . . Now, I will tell you why I am asking these questions about gifts to [Judge] McCarthy. It is because of a story that appeared in Time magazine on June 30. I do not know whether you read it or not but I will read part of it to you. It is on page 14. They are discussing the case.

Mr. Goldfine: A little louder, please, Mr. Bennett.

Mr. Bennett: They are discussing the case which was presently pending against you in the District Court in Boston in Judge Wyzanski's court.

There is this paragraph: "Even Judge Wyzanski barely jumped away from the flash of Goldfine's friendship money. Last November while he patiently started to sort the complex Boston Port operation, Wyzanski spent an evening with his wife at one of her fund-raising operations, this one for the American-Israel Cultural Organization" —which I assume is a very worthy cause.

Going to the article:

"Who should turn up and make a thousand dollar contribution 'in honor of Mrs. Wyzanski', but Bernard and Charlotte Goldfine whom the Wyzanskis had never met socially. With an air of innocent enthusiasm, Mrs. Goldfine bustled over to say that her husband had made the gift 'because he admired your wife.' Outraged Wyzanski considered disqualifying himself in the Boston Port case, discussed the incident with other judges and then rapped out an unusual personal comment from the bench, 'I am not clear whether Mr. Goldfine appreciated the significance of what he was doing.' "

Is it true that you gave the thousand dollar contribution in honor of Mrs. Wyzanski at the time you had this case pending?

Mr. Goldfine: Can I ask you a question, Mr. Bennett?

Whoever wrote that would be the same man that had the same kind of sickness that John Fox had. Who wrote that? You are reading something from Time.

Mr. Bennett, do you want to know the full facts? Then I will tell you. Just a minute.

You asked for it and I will give it to you.

Mr. Bennett: You did not answer the question.

Mr. Goldfine: Give me a chance.

Mr. Bennett: If you say this——

Mr. Goldfine: Going to answer.

Mr. Bennett: Let me preface my remarks further, Mr. Chairman.

I am not vouching for the authenticity of the facts. I am merely quoting them to you from Time magazine.

Mr. Goldfine: From the Time.

Mr. Bennett: Yes.

(The witness confers with his counsel.)

Mr. Goldfine: Mrs. Goldfine

The Chairman: You may answer if you like.

Mr. Goldfine: Mrs. Goldfine received a personal invitation to a musicale. She had the letter. We have the invitation to be present at a musicale that was given in honor of Mischa Elman, the violinist.

(The witness confers with his counsel.)

Mr. Goldfine: The letter was from Mrs. Wyzanski, this letter. That is Judge Wyzanski's wife and

Mr. Bennett: Did you give

Mr. Goldfine: Wait a minute. Let me tell you the facts because I might give the public the wrong impression.

The Chairman: Go ahead and answer the question in your own way.

Mr. Goldfine: And we, Mrs. Goldfine decided to accept the invitation. Mrs. Wyzanski asked for a reply. She got a reply from Mrs. Goldfine that we would be there.

We didn't ask to go there. We were invited by Mrs. Wyzanski. We had an invitation and we have the letter that was sent.

Now, what that musicale was, it was given in honor of Mischa Elman, the violinist, but that was whatever money was donated there was to go to build some kind of a musical center in Israel, and there were a lot of our friends there. It was the first time that we had been invited to that kind of an affair. Mrs. Goldfine and myself being admirers of Mischa Elman, and getting an invitation from Mrs. Wyzanski, we have her invitation in writing and an answer, we came there.

While we were there, after the concert was over, they asked for contributions and I listened to what others did, good friends of mine and Mrs. Goldfine's, and I thought the cause was a cause was very good, it was a charitable thing and others had donated a thousand dollars, quite a

few thousand dollars, so Mrs. Goldfine and myself donated a thousand dollars which you can make payable in two payments but that was not given in honor of Mrs. Wyzanski. You have it wrong. We have the proof that that had nothing to do with Mrs. Wyzanski.

Mr. Bennett: I am glad you cleared that up. I certainly think it is a worthy cause and my question was not raising any question.

Mr. Goldfine: What did you say?

Mr. Bennett: I am not raising an inference.

Mr. Goldfine: I mean you might give the public a different impression. There is a big difference between whether somebody invites you or whether you go with some ulterior motive in mind. Those are not the facts.

Mr. Bennett: I agree with you completely.

Mr. Goldfine: Good. I do I do with you.

Mr. Bennett: I agree with you completely in this respect that certainly that you were contributing to was a worthy cause.

I would be the last one to criticize it. What I wanted to know, and you took quite a while to get to the point was whether you had made the contribution in honor of Mrs. Wyzanski. You deny that you did that?

Mr. Goldfine: I did not make it in honor of Mrs. Wyzanski. We have also a letter from the fellow who went around to take the pledges that it wasn't given, it was solicited by. He asked us how did we come there, and we told him we were invited by Mrs. Wyzanski, and we were.

Mr. Bennett: I am not talking about that, Mr. Goldfine. I am asking you the question. This is the question: Do you deny that the thousand dollar contribution to the charity was made by you in honor of Mrs. Wyzanski?

Mr. Goldfine: I do.

Mr. Bennett: Now, did Judge Wyzanski refer to this incident later from the bench in saying what is quoted here?

Mr. Goldfine: He did.

Mr. Bennett: Just a minute. Wait until I finish the question. "I am not clear whether Mr. Goldfine appre-

viated the full significance of what he was doing." Did Judge Wyzanski make that statement?

Mr. Goldfine: He probably did, but we knew the facts. It was a horse of another color.

Mr. Bennett: Were you aware of Judge Wyzanski's statement?

Mr. Goldfine: What did you say?

Mr. Bennett: Were you aware that Judge Wyzanski made this statement?

Mr. Goldfine: I wasn't aware and I didn't care because I knew the facts.

(The witness confers with his counsel.)

Mr. Bennett: Did you make any effort to correct it?

Mr. Goldfine: I was not there when Judge Wyzanski made the speech.

Mr. Bennett: But you knew he made it?

Mr. Goldfine: Do I know Judge Wyzanski?

Mr. Bennett: Do you know he made the statement?

Mr. Goldfine: No question about it because my attorneys told me. They were there.

Mr. Bennett: Did you make the same explanation to the judge that you are making to me?

Mr. Goldfine: Mr. Sears and Mr. Brickley did. We did more than that. We got in touch with the one who made the pledge and got him in from Philadelphia where he lived.

The judge didn't know that Mrs. Wyzanski had given us a personal invitation. I don't think he did. Judge Wyzanski is a very fine man.

Mr. Bennett: Did the judge modify his statement in any way?

Mr. Goldfine: Did he what?

Mr. Bennett: Has Judge Wyzanski modified the statement that he made criticizing you?

Mr. Goldfine: He didn't criticize me. He didn't criticize me one bit.

Mr. Bennett: I will let the record speak for itself.

Mr. Goldfine: The record but also

Mr. Bennett: He said, "I am not clear whether Mr. Goldfine appreciated the full significance of what he was doing." That is what the judge said.

(The witness confers with his counsel.)

Mr. Bennett: All right. I have just one question.

You deny that anything was done in honor of Judge Wyzanski?

Mr. Goldfine: I deny that that was given in honor of Mrs. Wyzanski. Why should I?

APPENDIX A

Findings and Opinion of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal No. 58-208-W

UNITED STATES OF AMERICA

v.

BERNARD GOLDFINE

Criminal No. 58-209-W

UNITED STATES OF AMERICA

v.

MILDRED PAPERMAN

FINDINGS, CONCLUSIONS, and OPINION

December 19, 1958

WYZANSKI, D. J.

1. On December 10, 1958 the United States filed petitions for attachment for criminal contempt against Bernard Goldfine and Mildred Paperman, and simultaneously Fred G. Pastore, Group Supervisor, Intelligence Division, Internal Revenue Service, filed against the same persons petitions for civil contempt. All these proceedings arose out of asserted violations of this Court's Interim Order of December 5, 1958. This Court heard the criminal and civil cases in one set of hearings, Tuesday, December 16, and yesterday, December 18.

2. This set of findings and conclusions relates solely to the attachments for criminal contempt, those proceedings having been finished, and argument had thereon. The attachments for civil contempt abide the presentation on Monday, December 22, 1958, of a written motion by defendants to amend the December 5 Order, and argument of counsel thereon, and on the other questions presented in the civil cases.

3. The history of the criminal cases begins in the summer of this year. Duly authorized agents of the Internal Revenue Service then started an investigation of the tax liability of five corporations in which defendant Goldfine was interested: Lebanon Mills Corporation, Lebandale Mills, Inc., George Mabbett & Sons Company, Strathmore Woolen Company, and Northfield Mills, Inc.

4. Defendant Goldfine, at all material times, has been president and treasurer of the first, second, and fourth of these companies, and has been president of the third. By virtue of such offices he has been in a position to exercise control over the records of those corporations. Even as to the minute books of those corporations, he has been in a position to direct the clerks of those corporations to produce them before an appropriate public authority. Defendant Goldfine has authorized defendant Paperman to produce before Internal Revenue Service authorities requested documents belonging to Strathmore Woolen Company. Moreover, she, at all material times, has been in control of the records of Northfield Mills, Inc. as well as the records of Strathmore Woolen Company.

5. On July 21, 1958 duly authorized agents of the Internal Revenue Service served administrative subpoenas upon appropriate officials or representatives of the five corporations. In the cases of the first four corporations, defendant Goldfine was the official named in the subpoenas. The subpoenas in each case covered a number of types of documents. For present purposes, it will be sufficient to say that

the administrative subpoenas embraced, among other types of documents, these seven records, hereafter called *the seven listed records*:

(a) from Lebanon Mills Corporation, the accounts receivable ledger for the years 1952 through 1957 (See Exhibit AA)

(b) from Lebanon Mills Corporation, the accounts payable ledger for the years 1952 through 1957 (See Exhibits AB and AC)

(c) from Strathmore Woolen Company, the accounts receivable ledger for the years 1953 through 1957 (See Exhibit E)

(d) from Strathmore Woolen Company, the accounts payable ledger for the years 1953 through 1957 (See Exhibit D)

(e) from Strathmore Woolen Company, the cancelled checks for the years 1953 through 1957 (See Exhibit F)

(f) from Northfield Mills, Inc., the accounts receivable ledger for the fiscal years ending April 30, 1953 through April 30, 1957 (See Exhibit T).

(g) from Northfield Mills, Inc., the accounts payable ledger for the fiscal years ending April 30, 1953 through April 30, 1957. (See Exhibit U)

6. To avoid any suggestion of unfairness, it should be specifically stated and emphasized that the administrative subpoenas called for surely more than half a ton of documents, covered many years besides those listed above, and were cast in terms of undifferentiated generality. The reason that this opinion concentrates on the aforesaid seven records is because with respect to them the evidence is so clear that they command an inevitable conclusion. The only reason to refer to other documents is to see whether for

some reason the facts that those other documents were covered by administrative or judicial subpoenas, or were produced by defendants in response to such subpoenas, furnishes some exculpation, excuse, or mitigating circumstance for the defendants' failure to produce one or more of the seven listed records.

7. After the administrative subpoenas were served, the corporations named therein, through appropriate officers and counsel, requested the Internal Revenue Service representatives not to insist on production at the Service's offices at 55 Tremont Street, Boston, in accordance with the terms of the subpoenas, but instead to examine the records at Kneeland Street. As a matter of convenience, The I.R.S. representatives did not press for immediate compliance with the subpoenas.

8. During the summer they examined the records at the Kneeland Street offices of defendant Goldfine. In August or thereabouts each of the seven listed records was personally observed by at least one of the I.R.S. representatives. For example, Agent William L. Donovan examined the Northfield Mills Inc. accounts receivable ledger and accounts payable ledger, and indeed saw included in their bindings a Yale Wool Waste Co. account which was not so included at the time these ledgers were subsequently offered in evidence to this Court by the defendants. (See the portions of Ex. V read into evidence during the re-direct examination of William L. Donovan). It was during this same summer season that Agent Patrick J. Mullens observed duplicate deposit books, cancelled checks, and check book stubs of Lebanon Mills Corporation, which have never been produced in response to this Court's Interim Order.

9. After this examination at the Kneeland Street offices, Pastore determined to require compliance with the administrative subpoenas.

10. On November 5, at Pastore's instruction, Agent James P. Barry made a formal demand for the Lebanon, Lebandale, and Strathmore records. Defendant Goldfine said that the accountants were working on the books. Barry then talked to defendant Paperman about other corporate records, and received a similar answer.

11. Thereupon, in what is known on our docket as Case E.B.D. 7-8-81-W, on December 3, 1958 Pastore filed a petition for enforcement of the aforesaid administrative subpoenas. December 5 this Court held a hearing. On the same day, December 5, this Court issued what it entitled an Interim Order. The defendants' counsel admit that this Order was duly served on the defendants. This Order covered the seven listed records and also a great many other documents, indeed so many that they certainly would weigh over 1200 pounds and would require a cubic container of at least 6 feet on a side.

12. The seven listed records, however, were plainly described in this Court's Interim Order. No one, either before the order was issued, when it was issued, or at any time before the second day of the present contempt hearing (that is, yesterday, Thursday, December 18) ever suggested to the Court that the Interim Order failed clearly to demand production of these seven listed records or was burdensome or invalid because these seven listed records were kept in loose-leaf binders in which there were *on some (but not all) of the detachable pages* entries covering current 1958 items which were not embraced within the Court's subpoena. And this omission becomes more significant in view of this Court's specific warning on December 5, the day it issued the Interim Order, that defendants, if they failed to comply would be held accountable in proceedings for both civil and criminal contempt.

13. Following the entry of this Court's Interim Order which required production of the seven listed records as well as many other records before the Internal Revenue

Service at 55 Tremont Street, by noon on Monday, December 8, 1958, the present defendants sought to appeal to the Court of Appeals. That Court granted a stay until 3 P.M. on December 8, and then denied the appeal for lack of jurisdiction.

14. Neither on Friday, December 5, nor on Monday December 8, nor at any other time did defendants file in this or any other Court any motion to defer the time of production of records on the ground that compliance was physically impossible.

15. From the evidence submitted in this criminal case, it appears that defendants delivered approximately 1300 pounds of material to the I.R.S. at 3 P.M. on Monday, December 8, and that though they delivered some minor items in the next few days, they did not deliver to the I.R.S. the seven listed records until 1:30 P.M. on Thursday, December 18. Moreover, they made this delivery only after their counsel had first offered them as exhibits in this Court, and this Court had commented that such delivery was not a compliance with the Interim Order. On all the evidence, this Court finds that there was no physical impossibility, nor any impracticability, nor any substantial inconvenience which interfered with the delivery to the I.R.S. at 3 P.M. on Monday, December 8, 1958, of the seven listed records. Even more clearly there was no interference of any kind with delivery on Tuesday, December 9, 1958, or on Wednesday morning, December 10, 1958.

16. Late on Wednesday afternoon, December 10, 1958, the United States filed against the two defendants separate petitions for attachment for criminal contempt. In 58-208 W, Count One alleged the wilful failure of defendant Gelfine to produce, in accordance with the Interim Order, the first two of the seven listed records, as well as other items. Counts Two and Three related to other matters. In 58-209 W Count One alleged the wilful failure of defendant Paper

man to produce, in accordance with the Interim Order, the third, fourth, and fifth of the seven listed records, as well as other items; and Count Two alleged the wilful failure of the same defendant Paperman to produce, in accordance with the Interim Order, the sixth and seventh of the seven listed records.

17. This Court scheduled a hearing for Tuesday, December 16, 1958. No postponement was sought.

18. The Government moved to quash a subpoena which defendants had served on Pastore on Monday afternoon, December 15, requiring him to produce everything which defendants had in fact delivered up to 4:25 P.M. December 15, 1958 to the I.R.S. This Court granted the motion. But the Government agreed that in fact somewhat over 1300 pounds of records had been delivered!

19. During the first day of testimony, December 16, 1958, the Government offered Pastore and half-a-dozen of his subordinates who testified as to the investigations they had conducted and the observations they had made. Defendants sought permission to examine the inter-office or departmental reports which the several witnesses had made. The Court granted this permission in full. Defendants' counsel examined most of these reports during 6 hours on Wednesday, December 17, 1958, on a day when the Court recessed to allow such examination. Defendants' counsel examined the balance of the reports, (which, pending a ruling by this Court, the Government had temporarily withheld,) between 1 P.M. and 3 P.M. on Thursday, December 18, 1958, when again the Court recessed to allow such examination.

20. In the course of the cross-examination of the I.R.S. agents, the defendants' counsel themselves introduced the seven listed records, Exhibits AA, AB, AC, E, D, F, T, and U, (AB and AC, being two parts of what this opinion calls one record).

21. Defendants' counsel admitted that they themselves had seen these records, and labeled them, at least as early as Monday, December 14, 1958.

22. The records when offered in court were shown not to be bound books with stitched pages, but loose leaf folders containing pages clamped together by posts that were readily unclamped or unscrewed. Moreover, it appeared that most of the pages had entries all of which antedated 1958, but that some of the pages had entries for periods of time both preceding and including 1958, and perhaps a few of the pages had entries only for 1958. Counsel conceded that the pages were susceptible of photostating, though no concession was made as to how promptly the photostating could have been done. Finally, counsel conceded that at no time before Thursday, December 18, had anyone drawn to this Court's attention the fact that Exhibits AA, AB, AC, E, D, F, T, and U had within their four corners both records called for by the Interim Order and also records not so demanded, and that at no time had anyone proposed segregation of the two types of records, photostating, partial surrender, or other accommodating techniques.

23. After the Government's evidence had concluded, and cross-examination of the Government's witnesses had been completed, defendants' counsel, following two recesses requested by them, decided to leave the case to be decided on the evidence already before the Court. It should be noted that, despite an argumentative thrust by defendants' counsel suggesting that defendants' failure to produce the seven listed records might be due to advice of counsel, when this Court specifically commented that defendants had offered no evidence to support that argument, this comment did not lead defendants' counsel to take any action, or to make any reply, or to seek to re-open the case.

24. The facts having been recited, it now becomes appropriate to apply the relevant principles of law which have recently been re-stated in *Nilva* v. *United States*, 352 U.S. 385.

25. It is, of course, elementary that these being criminal cases, the Government has the burden of proving beyond a reasonable doubt every constituent element of the crimes charged.

26. It is also elementary that to warrant a conviction on these pleadings, which were filed late in the afternoon of December 10, 1958, the Government must prove beyond a reasonable doubt that the crimes had been committed, and that each constituent element existed, on December 10, 1958, before the crimes were charged.

27. In a case of alleged criminal contempt for wilful failure to comply with a judicial subpoena or order addressed to a defendant requiring him to produce a record, that is, in the sort of case now at bar, the Government must ordinarily prove these six elements of the crime beyond a reasonable doubt: (1) that the Court issued an order for the production at a particular time and place of a record adequately described in the order, (2) that the defendant was served with (or otherwise knew of) the order, (3) that the record existed at the time the order was served, (4) that the defendant had control (or lawful power to acquire control) of the record, (5) that the defendant failed to produce (or cause the production of) the record, and (6) that the defendant acted wilfully.

28. In the case at bar the first two elements are so beyond dispute as not to require comment.

29. Defendants' counsel suggest that as to the third element, the Government has not shown that defendants knew on December 8, 9, or 10 that these seven listed records existed. But with respect to element 3, *as distinguished from element 6*, the Government need not prove

that a defendant knew or should have known on the date a record was due to be produced that the record then existed. As to element 3 it is sufficient to prove beyond a reasonable doubt that the record existed on the date the order was served. And, it is incontrovertible that Exhibits AA, AB, AC, E, D, F, T, and U existed on December 5, 6, 7, 8, 9, and 10 just as surely as they existed on December 18 when defendants themselves offered the records in open court.

30. As to element 4, the Government proved that defendant Goldfine was president of Lebanon Mills Corporation. As such he had control of Exhibits AA, AB, and AC. The Government also proved beyond a reasonable doubt that defendant Paperman had actual control of Exhibits E, D, F, T and U.

31. Item 5 is proved by the fact that defendants did not deliver the seven listed records to the I.R.S. until 1:30 P.M. yesterday, Thursday, December 18.

32. With respect to item 6 the Government proved wilfulness in several ways. It will be enough to recite that each defendant knew in August 1958 of the existence of such of the seven listed records as he or she has been required to produce; he or she had reported in November 1958 to Agent Barry that the record was being worked on by accountants; and he or she knew that records of that type were kept in an ordinary business office in Kneeland St. Thus each defendant knew on December 5 of the existence of the record which he or she was commanded to produce. Failure to produce promptly such a known and readily reached record is wilful defiance.

33. The fact that other records were supplied is irrelevant in this case. One can imagine a situation where a defendant was so continuously occupied in carting to the I.R.S. records actually supplied, that he had no second's pause in which to get hold of a particular additional record.

This is no such case. Defendants were not continuously occupied until the afternoon of December 10 in supplying records. And they never asked for more time, or asserted that they were pressed, or applied for modification of the Interim Order.

34. Nor is it any excuse that the exhibits containing the seven listed records also contained other records irrelevant to this case. Often a court requires the production of an exhibit which has a combination of both relevant and irrelevant matter, or a combination of both matter required by the court for testimonial purposes and matter required by the subpoenaed person for business purposes. If the respondent to the subpoena believes a segregation is desirable or necessary, it is incumbent on him to propose the segregation or duplication of the exhibit. And usually a dozen techniques to that end are available and would be approved by a court. Here neither defendant proposed any such technique. Instead, he chose to fail to comply with the Interim Order, in so far as it covered these seven listed records.

35. What defendants' reasons were for refusing to respond with respect to these seven records this Court does not know. And it is no part of the Government's burden to prove these reasons. The Government need not prove that defendants did or did not consult counsel. The Government need not prove that defendants were or were not abstracting from the loose leaf records pages that once were clamped into the record. All that the Government must prove is the defendants' wilful disobedience. And that the Government has shown beyond a reasonable doubt.

36. Moreover, there is no showing that either defendant had, in the words of Rule 17 (g), Federal Rules of Criminal Procedure, "adequate excuse" for his or her failure to comply with this Court's Interim Order of December 5 to produce the seven listed records.

37. This Court, therefore, finds and concludes that defendant Bernard Goldfine is guilty as charged in Count One, but is not guilty as charged in Counts Two and Three of Cr. 58-208-W, and that defendant Mildred Paperman is guilty as charged in Counts One and Two of Cr. 58-209-W. Both defendants shall appear at 10 A.M. Monday, December 22, 1958, in Courtroom 6, United States Courthouse, Boston to be sentenced for their respective criminal contempts committed in defiance of this Court's Interim Order of December 5, 1958 and the specific warning to them which accompanied the issuance of that Interim Order.

s/ CHARLES EDWARD WYZANSKI, JR.
United States District Judge

December 19, 1958

APPENDIX B

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5460

BERNARD GOLDFINE, *Defendant, Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

No. 5461

MILDRED PAPERMAN, *Defendant, Appellant,*

v.

SAME

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[169 F. Supp. 93]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges.*

Harold Rosenwald, with whom *Burton L. Williams*, *James R. McGowan* and *Paul A. Powell* were on brief, for appellants.

Andrew A. Caffrey, Assistant U. S. Attorney, with whom *Anthony Julian*, United States Attorney, and *George H. Lewald*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT

July 24, 1959.

MAGRUDER, *Circuit Judge* (Retired). These appeals arise out of perhaps the most publicized cases heard this year. We are unable, however, to find any substance in appellants' contentions.

It appears that during the summer of 1958 the Internal Revenue Service started looking into the tax liabilities of five corporations in which Bernard Goldfine had an interest, namely, the Lebanon Woolen Mills Corporation, Lebandale Mills, Inc., George Mabbett & Sons Company, Strathmore Woolen Company, and Northfield Mills, Inc., at least some of which corporations had filed no income tax returns for several years.

Appellant Goldfine was president and treasurer at all material times of three of these corporations, Lebanon Woolen Mills Corp., Lebandale Mills, Inc., and Strathmore Woolen Co. He was also president of George Mabbett & Sons Co. It is undisputed that by virtue of such offices Goldfine has had, during all material times, the control of the records of these corporations, and that appellant Mildred Paperman has at all material times been in actual control of the records of Strathmore Woolen Co. and of Northfield Mills, Inc.

Pursuant to administrative subpoenas issued by the Internal Revenue Service to assist in its current investigations, the records of these five corporations were made available to agents of the Service at Goldfine's office, 35 Kneeland Street, Boston, Massachusetts. Goldfine instructed the various bookkeepers, including appellant Paperman, to cooperate fully with the Internal Revenue Service.

Subsequently, at the request of counsel for the corporations, the investigation by the Internal Revenue Service

was suspended for sixty days so that agents of the corporations could have exclusive access to the corporate records for the purpose of preparing and filing their delinquent income tax returns. At this time it was made clear to appellants' counsel that the government was not abandoning its subpoenas and its investigation but merely suspending a portion of its inquiry for the sole purpose stated. "Accordingly, when we resume our examination, our audit will not be deemed a new inspection of the taxpayers' books of account within the purview of Section 7605(b), Internal Revenue Code of 1954."

After the expiration of the sixty-day period the Service refused to grant a request for extension and tried without success to obtain the return to it of the corporate records. Finally, on December 3, 1958, Group Supervisor Pastore filed in the United States District Court for the District of Massachusetts a petition for judicial enforcement of the aforesaid administrative subpoenas as provided for in §§ 7402(b) and 7604 of I.R.C. 1954. See the procedure outlined in *Brody* v. *United States*, 243 F.2d 378 (C.A. 1st, 1957), cert denied 354 U.S. 923 (1957). An order to show cause was issued, which came on for hearing before the district court on December 5, 1958. The outcome of this hearing was the issuance by the district court on the same day of a so-called "Interim Order" under which appellants were directed to produce at the office of the Internal Revenue Service, 55 Tremont Street, Boston, certain records of the corporations involved on or before a specified time on Monday, December 8, 1958. At this initial stage of the proceeding the district court elected not to issue a turn-over direction in the breadth requested by the government. Instead it chose to exclude from its interim order the records relating to all tax years with respect to which any contentions had been made by appellants that the taxing authorities had already completed an audit while the documents were previously available

for their inspection, whether or not the United States admitted that such a prior audit had been completed. The district court also chose to exclude from its enforcement order the records relating to any tax year with respect to which appellants had made the contention that the statute of limitations would apply (unless fraud were found). In addition, the district court struck out from the government's proposed order a request for the "stock certificate book" and other unspecified documents of each corporation. An appeal was attempted by the appellants from this interim order. In *Goldfine* v. *Pastore*, 261 F.2d 519 (C.A. 1st, 1958), we denied an application by the appellants for a stay of the district court's interim order pending appeal because we thought that, although a final enforcement order would be appealable, *O'Connor* v. *O'Connell*, 253 F.2d 365 (C.A. 1st, 1958), this was clearly just an interlocutory order from which we were without jurisdiction to entertain an appeal as of right. Later, by order entered February 12, 1959, we dismissed this appeal for lack of jurisdiction.

Claiming that the records had not been produced as set forth in the interim order, the United States Attorney late on December 10, 1958, filed against each of the said appellants a petition for attachment for criminal contempt. The petition against Bernard Goldfine was in three counts. Count I charged that Goldfine was guilty of criminal contempt by willful disobedience of so much of the interim order as related to the production of the records of the Lebanon Woolen Mills Corp. The court found Goldfine guilty on this count. Count II related to the failure to produce the records of Lebandale Mills, Inc., and Count III referred to those of George Mabbett & Sons Co. Since the district court found the defendant Goldfine not guilty on Counts II and III, they will hereafter be disregarded.

The petition for attachment for criminal contempt filed against defendant Mildred Paperman was in two counts.

the first charging willful disobedience in refusing to produce the records of Strathmore Woolen Co., and the second charging willful disobedience in the failure to produce the records relating to Northfield Mills, Inc. The district court found Miss Paperman guilty on both counts.

Appellants have taken these appeals from the respective judgments of conviction of criminal contempt. *169 F. Supp. 93.*

We reject the contention that the evidence was not sufficient to establish, beyond a reasonable doubt, what the district court found, that appellants deliberately and intentionally disobeyed the interim order of December 5, 1958.

The district court's memorandum finding appellants guilty of criminal contempt focused on the following seven so-called "listed records," production of which was required by the interim order:

1. Accounts receivable ledger of Lebanon Woolen Mills Corp. for 1952 through 1957. (Exhibit AA)

2. Accounts payable ledger of Lebanon Woolen Mills Corp. for 1952 through 1957. (Exhibit AB)

3. Accounts receivable ledger of Strathmore Woolen Co. for 1953 through 1957. (Exhibit E)

4. Accounts payable ledger of Strathmore Woolen Co. for 1953 through 1957. (Exhibit D)

5. Canceled checks of Strathmore Woolen Co. for 1953 through 1957. (Exhibit F)

6. Accounts receivable ledger of Northfield Mills, Inc., for April 30, 1952, through April 30, 1957. (Exhibit T)

7. Accounts payable ledger of Northfield Mills, Inc., for April 30, 1952, through April 30, 1957. (Exhibit U)

The district court correctly stated that the burden was on the government to prove beyond a reasonable doubt the presence of these six elements:

> "(1) that the Court issued an order for the production at a particular time and place of a record adequately described in the order, (2) that the defendant was served with (or otherwise knew of) the order, (3) that the record existed at the time the order was served, (4) that the defendant had control (or lawful power to acquire control) of the record, (5) that the defendant failed to produce (or cause the production of) the record, and (6) that the defendant acted wilfully."

We are satisfied that these records and the time and place for their production were adequately described in the interim order, and that, as stated above, the appellants had control over them. They admittedly were served with the order, and they even attempted to appeal from it. There is no doubt that the records existed (and appellants so conceded in oral argument before us), and that they were not produced at the office of the Internal Revenue Service, 55 Tremont Street, Boston, on or before the deadline on December 8. They were actually produced by defendants in the courtroom on December 18, during the contempt trial.

The only one of the six elements which is really in dispute is the sixth one, that the appellants acted willfully in failing to produce the aforesaid records. Willfulness almost necessarily has to be proved as an inference from circumstantial evidence; and in this case we cannot say that the district court erred in drawing that inference. Indeed we cannot see how the court could have failed to draw such inference. The government does not have the burden of negativing all possible excuses for noncompliance with a court order. It is enough to make out a prima facie case for the government

to show, as the government did below, that the appellants, in response to the interim court order calling for the production of corporation records, refused to surrender them when they were in existence and within their control. See *Vilva* v. *United States*, 352 U.S. 385, 392 (1957). Counsel for the defendants suggested at various times that their failure to produce the seven listed records, as required in the interim order, might have been due to the advice of counsel, which might negate willfulness. But that was only suggestion, and although the district court twice commented that the defendants had offered no evidence to support that suggestion, counsel neither took any action, made any reply, nor sought to reopen the case.

Though the corporations were located elsewhere, it is conceded, as appears to be clear, that all the "listed records" involved were physically present at Goldfine's office, 35 Kneeland Street, Boston. If defendants could cause the production of the records in the courtroom on December 18, it is difficult to believe that they had no power to produce them a few days earlier at the office of the Internal Revenue Service.

We may assume that, because the interim order was appealable only by a certificate of the district court which was not given and by leave of this court, appellants might defend against even charges of criminal contempt by showing the interim order to be invalid, despite the holding in *United States* v. *United Mine Workers*, 330 U.S. 258 (1947). But it is clear that the interim order, as signed, was not unreasonable or in violation of any rights of appellants or of the corporations.

When these documents were produced in court on December 18, it was for the avowed purpose of demonstrating to the court that they were current records in use by the corporations and that compliance with the interim order would make it impossible for the corporations to conduct

their business. This suggestion of course could not excuse failure to deliver the records contained in Exhibit F, which consisted of one small envelope containing bank statements and a number of canceled checks of Strathmore Woolen Co. covering only the period from 1953 to 1957. Furthermore the excuse is insubstantial, for the reasons stated by the district court in its finding 22:

> "The records when offered in court were shown not to be bound books with stitched pages, but loose leaf folders containing pages clamped together by posts that were readily unclamped or unscrewed. Moreover, it appeared that most of the pages had entries all of which antedated 1958, but that some of the pages had entries for periods of time both preceding and including 1958, and perhaps a few of the pages had entries only for 1958. Counsel conceded that the pages were susceptible of photostating, though no concession was made as to how promptly the photostating could have been done. Finally, counsel conceded that at no time before Thursday, December 18, had anyone drawn to this Court's attention the fact that Exhibits AA, AB, AC, E, D, F, T, and U had within their four corners both records called for by the Interim Order and also records not so demanded, and that at no time had anyone proposed segregation of the two types of records, photostating, partial surrender, or other accommodating techniques."

We find nothing in the record to sustain the contention of appellants to the effect that the interim order was invalid in its failure to afford appellants a "reasonable time" within which to comply with its requirements. So far as appears, this contention was not made in the district court until the hearing on the charges of criminal contempt; the only previous requests made were for time for counsel to prepare their arguments. Nor did the defendants in-

troduce any testimony in the contempt trial to sustain their theories of unreasonableness.

Other contentions by appellants, which we find it desirable to comment upon specifically, are of a more technical nature. It is suggested, by reference to expressions in dissenting opinions in the Supreme Court, that the convictions of criminal contempt are in violation of the constitutional rights of appellants under the Bill of Rights, in that the charges of criminal contempt were not initiated by a presentment or indictment of a grand jury, and that appellants were convicted by the district court, sitting without a petit jury.

It must be borne in mind that this court, as an intermediate appellate court, would certainly look very foolish if it took its law from a dissenting opinion, even from a dissenting opinion by a justice of the Supreme Court of the United States. In answer to this particular argument, we need only refer to the decisions of the Court in *Nilva* v. *United States*, supra, 352 U.S. 385; *Green* v. *United States*, 356 U.S. 165 (1958); and *Brown* v. *United States*, 359 U.S. 41 (1959). 18 U.S.C. § 402, relied upon by appellants, is pathetically inapplicable, since under the very terms of the section it is said not to be construed as relating "to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same . . . may be punished in conformity to the prevailing usages at law."

Much is made of the fact that the trial for criminal contempt was had before the same district judge (Judge Wyzanski) who issued the interim order alleged to have been disregarded. This procedure is routine in criminal contempt cases. Rule 42 of the Federal Rules of Criminal Procedure, issued by the Supreme Court, does specifically require the trial judge to disqualify himself from sitting at the hearing of a charge for criminal contempt in the

very understandably human situation where "the contempt charged involves disrespect to or criticism of a judge"; but otherwise, the rule contains no provision for a mandatory disqualification. It is said that Judge Wyzanski had obtained an unfavorable impression of appellants while sitting in other litigation in which they were involved. These prior litigations must have been familiar to appellants, but they made no motion before Judge Wyzanski asking him to disqualify himself. Moreover, there is no evidence of such impressions except certain remarks by the court in pronouncing the sentences. These phrases, read in context, cannot serve as the basis for any charge of prejudice. Under the circumstances, and in view of the concession in appellants' brief that there "can be no doubt that Judge Wyzanski made every conscious effort to be objective and impartial in this case," and in view of the inescapable force of the evidence presented by the government, and the obvious fairness of the sentences, we cannot find that the district judge committed an abuse of discretion in failing to disqualify himself on his own motion.

Some reference is made to the sentences, and to the fact which has disturbed the Supreme Court somewhat, that there is no maximum statutory limit to the sentencing power of the district court in criminal contempt cases. Here the judgment of conviction sentenced appellant Goldfine to be committed "to the custody of the Attorney General or his authorized representative for imprisonment for a period of three months." In the judgment of conviction of Miss Paperman, she was committed to the custody of the Attorney General for a period of ten days. These sentences which, if anything, err on the side of moderation, are justified and well within approved limits. See *Green* v. *United States*, supra, 356 U.S. 165; *Brown* v. *United States*, supra, 359 U.S. 41; and *Brody* v. *United States*, supra, 243 F.2d 378, cert. denied 354 U.S. 923. We find no abuse of discretion in this particular.

Judgments will be entered affirming the judgments and orders of the District Court.

APPENDIX C

Statutes Involved

18 U.S.C. 401. Power of the Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. 402. Contempts Constituting Crimes.

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law. June 25, 1948, c.645, 62 Stat. 701, amended May 24, 1949, c.139, Sec. 8(c), 63 Stat. 90.

18 U.S.C. 3691. Jury Trial of Criminal Contempts.

Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.

26 U.S.C. §7210. Failure To Obey Summons.

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e) (2), 6421 (f) (2), 7602, 7603, and 7604(b), neglects

to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

26 U.S.C. §7402. JURISDICTION OF DISTRICT COURTS.

(a) *To issue orders, processes, and judgments.* — The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To enforce summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U.S.C. §7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. Aug. 16, 1954, 9:45 a.m., E.D.T., c.736, 68A Stat. 901

26 U.S.C. § 7604. Enforcement of Summons

(a) *Jurisdiction of district court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such persons resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under sections 6420(e) (2), 6421(f) (2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such per-

son, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

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No. 396

In the Supreme Court of the United States

OCTOBER TERM, 1959

BERNARD GOLDFINE AND MILDRED PAPERMAN,
PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (Pet. 1a–12a) is reported at 169 F. Supp. 93. The opinion of the Court of Appeals (Pet. 13a–22a) is reported at 268 F. 2d 941.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1959 (Pet. 14a), and a petition for rehearing was denied on August 14, 1959. The petition for a writ of certiorari was filed on September 11, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the evidence before it, the District Court correctly found petitioners to be guilty of criminal contempt in willfully disobeying its order for the enforcement of an internal revenue summons.

STATUTES INVOLVED

18 U.S.C.:

SEC. 401. POWER OF COURT

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Internal Revenue Code of 1954:

SEC. 7402. JURISDICTION OF DISTRICT COURTS

* * * * *

(b) *To enforce summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

(26 U.S.C., Sec. 7402(b).)

Section 7604(b):

Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or

refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(26 U.S.C., Sec. 7604(b).)

STATEMENT

Petitioners were adjudged guilty of criminal contempt, in violation of 18 U.S.C. 401, for willful failure to comply with an order of the District Court requiring them to produce, at the office of the Internal Revenue Service in Boston, certain books and records of five corporations whose income tax liability was under investigation. Petitioner Goldfine was sentenced to three months' imprisonment; petitioner Paperman, to ten days' imprisonment. The Court of

Appeals for the First Circuit affirmed unanimously. (Pet. 12a, 22a; I R. 273–274.)[1]

The relevant facts as found by the District Court (Pet. 1a–12a), and as summarized by the Court of Appeals (Pet. 14a–19a), are as follows:

During the summer of 1958, agents of the Internal Revenue Service began an investigation of the tax liability of five corporations in which petitioner Goldfine had an interest: Lebanon Mills Corporation (Lebanon); Lebandale Mills, Inc. (Lebandale); George Mabbett & Sons Company (Mabbett); Strathmore Woolen Company (Strathmore); and Northfield Mills, Inc. (Northfield). (Pet. 2a, 14a.)

Goldfine was president and treasurer of Lebanon, Lebandale and Strathmore, and president of Mabbett. He had control of the records of these corporations. (Pet. 2a, 14a.) Paperman was in actual control of the records of Strathmore and Northfield. (Pet. 2a, 14a.)

On July 21, 1958, Internal Revenue Service agents served administrative subpoenas upon the five companies, calling for production of numerous corporate records and papers. The subpoenaed documents in-

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[1] The record certified to this Court by the Court of Appeals consists of three volumes. Following petitioner's enumeration of these volumes (Pet. 2, fn. 2), we designate as I R. and III R. the record of the proceedings in the District Court and Court of Appeals following the filing of the petitions for attachment for criminal contempt. Volume II, which we designate as II R., embodies the proceedings leading up to the issuance of the District Court's order in a civil action captioned *Fred G. Pastore, Group Supervisor, Internal Revenue Service, Petitioner* v. *Bernard Goldfine and Mildred Paperman, Respondents.*

cluded the following sets of records (hereafter referred to as the "seven listed records"): The accounts receivable and payable ledgers of Lebanon for the years 1952 through 1957, of Strathmore for the years 1953 through 1957, and of Northfield for the fiscal years ending April 30, 1953, through April 30, 1957; and the cancelled checks of Strathmore for the years 1953 through 1957. (Pet. 2a–3a, 17a.)

At the request of the companies, the Service did not insist upon production at its Boston office (as required by the subpoenas), but permitted the companies to make the records available at Goldfine's Boston office. The Service began its examination of the records,[2] but at the companies' request suspended examination for 60 days, so that corporate representatives could have exclusive access to the records for the purpose of preparing and filing delinquent income tax returns. However, the Service made it clear to counsel for the companies that it was not abandoning its investigation, but was merely temporarily suspending it for the limited purpose. It also emphasized that when the examination was resumed, it would not constitute a new inspection of the records which would require new subpoenas. (Pet. 4a, 14a–15a.)

After the expiration of the 60-day period, the Service refused a request for a further extension, and tried unsuccessfully again to examine the records. On November 5, 1958, formal demand was made for the

[2] Service agents examined the records at Goldfine's office during the summer of 1958. During that period, each of the seven records was personally observed by at least one of the Service representatives. (Pet. 4a.)

Lebanon, Lebandale and Strathmore records. Petitioner Goldfine stated that the accountants were working on the books. The Service agent then talked to petitioner Paperman about examining other corporate records, and received a similar answer. (Pet. 5a, 15a.)

On December 3, 1958, the Service filed in the district court a petition for judicial enforcement of the administrative subpoenas previously issued. On December 5, 1958, after a hearing, the court issued an "Interim Order," which directed petitioners to produce some, but not all, of the documents covered by the subpoenas.[3] It did cover the seven listed records. Production was directed to be made at the Boston office of the Service by Monday, December 8, 1958. (Pet. 4a–6a, 15a.)

Petitioners sought a stay of the interim order from the Court of Appeals for the First Circuit, but the latter denied it on the ground that the interim order was interlocutory and therefore nonreviewable. *Goldfine* v. *Pastore*, 261 F. 2d 519. The court, however, extended petitioners' time for compliance with the interim order until 3 p.m. Monday, December 8th.

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[3] The District Court did not direct production of (1) records relating to all tax years with respect to which petitioners contended that the taxing authorities had already completed an audit while the documents were previously available for their inspection, and (2) records relating to any tax years with respect to which petitioners contended that, absent fraud, the statute of limitations would apply. In addition, the District Court eliminated from the Government's proposed order a request for the "stock certificate book" and other unspecified documents of each corporation. (Pet. 15a–16a.)

Petitioners delivered approximately 1300 pounds of material to the Service at that time, and some minor items in the next few days. However, they did not deliver the seven listed records to the Service until 1:30 p.m. on Thursday, December 18, 1958. They made this delivery only after their counsel had first offered the seven records as exhibits at the contempt hearing before the District Court (which began on December 16, 1958), and the court had pointed out that such production was not in compliance with the interim order, which required delivery to the Service (Pet. 5a–6a).

On December 10, 1958, the United States Attorney filed petitions for attachment for criminal contempt against both petitioners. Petitioner Goldfine was charged with willful disobedience of the interim order by failing to produce the records of Lebanon, Lebandale and Mabbett (counts I, II and III, respectively); petitioner Paperman was charged with willful failure to produce the records of Strathmore and Northfield (counts I and II, respectively). (Pet. 6a–7a, 16a–17a.)

After hearing, the District Court (Judge Wyzanski) found petitioner Goldfine guilty on count I (relating to the Lebanon records), but not guilty on counts II and III; and petitioner Paperman guilty on both counts. (Pet. 12a.).

The District Court found that the Government had proved beyond a reasonable doubt the six elements of the crime of criminal contempt: (1) that the interim order adequately described the time and place for

production; (2) that petitioners had control over the records; (3) that they had been served with the production order; (4) that the records existed when the order was served; (5) that the records were not produced at the Boston office of the Service by the December 8, 1958, deadline; and (6) that such non-production was willful. (Pet. 9a–10a.) The court ruled (Pet. 10a) that "the Government proved willfulness in several ways." It stated (*ibid.*) that each petitioner knew in August 1958 of the existence of the record "which he or she was commanded to produce"; that he or she had reported to an agent in November 1958 that the record was being worked on by accountants; and that he or she knew that such records were kept in Goldfine's Boston office. It concluded (*ibid.*) that "Failure to produce promptly such a known and readily reached record is willful defiance."

The court further ruled that it was immaterial that petitioners had supplied other records, since they were not so continuously engaged in doing so as to prevent their producing the seven listed records; that it was not "any excuse" that the exhibits containing the seven listed records also contain other records "irrelevant to this case"; and that there was "no showing that either defendant had, in the words of Rule 17(g), Federal Rules of Criminal Procedure, 'adequate excuse' for his or her failure to comply with this Court's Interim Order of December 5 to produce the seven listed records." (Pet. 10a–11a.) It noted (Pet. 18a) that "the government does not have the burden of negativing all possible excuses for noncompliance with a court order."

In affirming, the Court of Appeals held (Pet. 14a), in an opinion by Judge Magruder, that it was "unable * * * to find any substance in appellants' contentions."

ARGUMENT

Contrary to petitioners' contention (Pet. 15), this case does not raise any "fundamental questions respecting the exercise of the criminal contempt power by the federal courts." It involves only the application of settled principles to the facts of this case. The District Court's adjudication that petitioners had willfully disobeyed the production order rested upon careful and detailed findings, and the Court of Appeals carefully reviewed petitioners' attacks on their conviction and found them not to have "any substance" (Pet. 14a). Accordingly, there is no occasion for further review by this Court.

1. Petitioners contend (Pet. 18–21) that the Government failed to prove that their non-compliance with the production order was willful. They do not deny, however, that they were aware of the existence, and had control, of the records which they were directed to produce; that they could have produced them on December 8, 1958 (as they produced so many other documents); that they failed to produce them until 10 days later; and that they offered no justification for such failure. Moreover, they concede (Pet. 18) that the Court of Appeals correctly held (Pet. 18a–19a) that "It is enough to make out a prima facie case for the government to show, as the government did below, that the appellants, in response to the interim court order calling for the production of corporation

records, refused to surrender them when they were in existence and within their control." (See *United States* v. *Bryan*, 339 U.S. 323, 330; *Nilva* v. *United States*, 352 U.S. 385, 392.) They contend (Pet. 18), however, that the rule is not here applicable, because they did not "refuse" to deliver the documents, but only delayed doing so.

But the order directed production on a stated date, and petitioners' unexplained and unjustified non-compliance was no less willful because, after they had been cited for contempt, they belatedly produced the documents. Whether non-compliance is willful depends upon the facts of the particular case and, as the court below pointed out (Pet. 18a), "Willfulness almost necessarily has to be proved as an inference from circumstantial evidence". Here the Government established all the necessary elements of willful disobedience of a court order (see *supra*, pp. 4–8). Petitioners made no attempt to justify their non-compliance, either by showing impossibility, undue burden, or any of the other possible excuses therefor referred to by the District Court (Pet. 3a–4a). Indeed, the trial court expressly warned, when it issued the interim order, that petitioners would be held accountable in contempt proceedings if they failed to comply (Pet. 5a). While it is true that petitioners produced the bulk of the material covered by the interim order, the records not produced—ledgers showing accounts payable and receivable, and cancelled corporate checks—might well have been the crucial documents for determining whether any of the companies had violated the Internal Revenue laws.

On this record, as the Court of Appeals held (Pet. 18a), petitioners' non-compliance stands as a clear case of willful disobedience.

2. There is no substance to petitioners' argument (Pet. 21–23) that the interim order was illegal because it afforded insufficient time for compliance. Petitioners made no attempt to seek modification of the order to allow additional time for compliance, either before the compliance date or, indeed, up to the time of trial.[4] Furthermore, there is nothing which shows, or even suggests, that petitioners could not have produced the seven listed records by October 8, 1958. These books and records had originally been designated in the administrative subpoenas served in August 1958, four months prior to the production order. Petitioners' own representatives, with the concurrence of the Service, had been permitted to use the books undisturbed for a two-month period, after which the Service attempted unsuccessfully to resume its examination. Petitioners delivered some 1300 pounds of books and records to the Service on December 8, 1958, as directed by the interim order. (Pet. 6a.) They withheld seven sets of records which were readily available in Goldfine's Boston office when the interim order was issued[5] and were under their control (Pet. 2a).

[4] After the Government had rested at the criminal contempt trial, petitioners stated (I R. 216) that they intended to move the court to "modify to a certain extent" the interim order. The trial court pointed out that although such a modification might affect petitioners' liability for civil contempt, it could not alter "whatever criminal liability may or may not exist." (I R. 217.)

[5] Petitioners refer to (Pet. 9) Miss Paperman's statement to the agents in the summer of 1958 that "many of the documents

Accordingly, the Court of Appeals was fully warranted in concluding (Pet. 19a) that it is "difficult to believe" that if petitioners "could cause the production of the records in the courtroom on December 18 * * * they had no power to produce them a few days earlier at the office of the Internal Revenue Service"—as, in fact, they produced the bulk of the documents covered by the interim order.

3. Petitioners urge (Pet. 23–32) that they were denied a fair trial because the trial judge had formed an unfavorable opinion of petitioners from prior unrelated cases, and had been embroiled with petitioner Goldfine "in a public dispute" (Pet. 28) several months before the trial. But petitioners made no motion (under 28 U.S.C. 144) to disqualify the trial judge for bias and prejudice, and such failure is not justified by their present assertion (Pet. 31) that such a "motion would in any event have been futile." Moreover, as the Court of Appeals pointed out (Pet. 22a), the primary ground upon which petitioners predicate their claim of prejudice—the court's statements in passing sentence—"cannot serve as the basis for any charge or prejudice." In these circumstances, the Court of Appeals correctly held (Pet. 22a) that the district judge had not "committed an

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were scattered throughout the files * * * and had to be collected". This statement, however, related only to supporting vouchers (I R. 85, 90–91, 96), which had nothing to do with the seven listed records. Similarly, petitioners' statement (Pet. 9) that some of the records covered by the interim order were located outside of Boston ignores the fact that none of the seven listed records was so located.

abuse of discretion in failing to disqualify himself on his own motion."

4. Petitioners urge (Pet. 32–34) that the trial court was precluded from finding willfulness because their counsel stated at the contempt hearing that he had determined the time, place and manner of production of the seven listed records. The Court of Appeals fully answered this contention when it pointed out (Pet. 19a): "But that was only suggestion, and although the district court twice commented that the defendants had offered no evidence to support that suggestion, counsel neither took any action, made any reply, nor sought to reopen the case."

5. Finally, petitioners contend (Pet. 34–36) that their conviction of criminal contempt by the court denied them their constitutional right to trial by jury and indictment by grand jury. However, "The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right"; and "this Court has never suggested that * * * [the] protections * * * [traditionally surrounding contempt proceedings] * * * included the right to grand jury indictment." *Green* v. *United States*, 356 U.S. 165, 183, 184. Cf. *Nilva* v. *United States*, *supra*; *Brown* v. *United States*, 359 U.S. 41.

The fact that refusal to obey the Service's administrative subpoena is a misdemeanor is immaterial. Petitioners were not tried and convicted for that

offense, but for the offense of criminal contempt. Section 7604(b) of the Internal Revenue Code of 1954 specifically provides for judicial enforcement of Service subpoenas, and authorizes the judge "to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1959.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF BY PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 396

BERNARD GOLDFINE and MILDRED PAPERMAN,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF BY PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI*

I

1. The Issues Presented. The Government, in its Brief in Opposition, seeks to brush aside the serious

* In lieu of filing a separate memorandum, we are incorporating in this reply brief a separate section, p. 8, *infra*, concerning a defect in the jurisdiction in the Court of Appeals (the participation in the proceeding by a non-qualified judge) which renders the judgment void. The facts came to the attention of Petitioners after the petition for certiorari was filed. The issue is related to the question presented to this Court by the Solicitor General in No. 138, *United States* v. *American-Foreign Steamship Corp., et al.*, in which certiorari was granted on October 13, 1959.

issues presented by comparing this case to a commonplace criminal proceeding. Thus, the Government argues that the petition "involves only the application of settled principles to the facts of this case" (Opp. Br. 9). But the Government cites no case involving contempt with respect to an order for production, and we are aware of none, involving circumstances remotely similar to those presented here. This contempt conviction is a declaration that criminal defiance of a court may be inferred from the mere fact of delay in producing a handful out of a mass of corporate records required to be produced within forty-eight hours, and even though the few records on which the conviction was based were brought to court by the contemnors themselves at the beginning of the trial. Compare *Nilva* v. *United States*, 352 U.S. 385.

Moreover, criminal contempt proceedings for disobedience of an order to produce do not typically involve the extraordinary and serious issues respecting the impropriety of adjudication by the District Judge which are presented by the record in this case. In addition, this is the first case to present the question, reserved by this Court in *Green* v. *United States*, 356 U.S. 165, where the underlying conduct deemed to constitute a contempt would also be punishable as a substantive crime. (See Pet. 34-36.)

2. **The Burden of Proving Wilfulness.** In its Brief in Opposition, the Government vacillates between the legal argument that wilfulness may be established from the mere fact of delay in producing these voluminous records and the factual contention that there is sufficient evidence in the record to show an intent to defy the court.

The issue of wilfulness does not raise a mere question of sufficiency of evidence, as the Government suggests. Rather it raises a question of the burden of proof in a special kind of criminal case, where a judge is the sole arbiter of the issue whether his own order has been wilfully disobeyed. Echoing the two opinions of the courts below, which are now under attack, the Government assumes that failure to obey any court order to produce documents within the time allowed is wilful, unless justification is shown for such failure (Opp. Br. 9-10). Thus, the Government would relieve itself of the prosecution's burden of proving wilfulness and cast upon the defendant the burden of proving lack of wilfulness. If we have correctly stated the issue, it is difficult to conceive of a more critical question in the area of criminal procedure in the federal courts.

The Government argues: "They (i.e., petitioners) withheld seven sets of records which were readily available in Goldfine's Boston office when the interim order was issued and were under their control" (Opp. Br. 11.) Petitioners did not withhold the seven records nor any other records. They turned over every record called for by the Order. Surely in the circumstances of this case, the delay in producing seven particular documents can not be construed as wilful defiance in the absence of some proof of improper motive.

The core of the Government's argument is the contention that petitioners were guilty of "unexplained and unjustified non-compliance" (Opp. Br. 10). And again, that "Petitioners made no attempt to justify their non-compliance, either by showing impossibility, undue burden, or any of the other possible excuses therefor referred to by the District Court" (*Ibid*).

But the record shows clearly that the delay in delivery of these seven records was both explained and justified. With respect to the seven records, petitioners' trial counsel told the District Court as follows (Vol. I, 202-203):

> "Mr. Kelleher: The interim order ordered delivery of certain years and certain years only; and when I have a chance to be heard fully on this matter, I think I will show your Honor that it was not possible to comply with the order with the documents in their present form. Copies would have to be made either by transcription or photostat, and *it was impossible to comply with your Honor's order in the time allotted.*
>
> "The Court: Well, I understand the argument and it need not be elaborated." (emphasis supplied)

In short, the seven records, unlike the hundreds of records turned over by petitioners on December 8 and thereafter, contained material not called for by the order to produce. Rightly or wrongly, petitioners' trial counsel believed that he was entitled to solicit a suggestion from the District Court as to the mechanics for segregating irrelevant material. Failing to get that suggestion, he promptly delivered the documents in their original form to the Internal Revenue Service with the irrelevant material included. (See Findings of District Court, Pet. p. 6a, para. 15; *Id.*, p. 7a, para. 20.) The Government in its brief simply ignores this critical episode at the trial.

The record thus affirmatively shows that any delay was the result of advice of counsel. Certainly, this is a valid excuse for the time and manner of the production of documents. In any event, the record belies the Government's sweeping claim (Opp. Br. 11) that

"there is nothing which shows, or even suggests that petitioners could not have produced the seven listed records by December 8, 1958". In trial counsel's words, *supra*, "It was impossible to comply with your Honor's order in the time allotted."

3. **Government's Failure to Show Improper Motive.** In its frantic search for circumstantial evidence to support its claim of wilful defiance, the Government goes to the following extreme of speculation and surmise. It states (Opp. Br. 10):

> "While it is true that petitioners produced the bulk of the material covered by the interim order, the records not produced—ledgers showing accounts payable and receivable, and cancelled corporate checks—*might well have been the crucial documents for determining whether any of the companies had violated the Internal Revenue laws.*" (emphasis supplied)

The last part of this sentence is a reckless effort by the Government to sustain petitioners' conviction by libelous innuendo. The Government's charge that petitioners "might well" have been concealing evidence is without basis in the record. These same documents had been examined by the Government (see Opp. Br. 5, n. 2), and Goldfine knew that such examination had been made. The Government did not ask petitioners to give these seven records priority in delivery over any others. Had the Government been able to assert at the trial that the documents were of particular importance, it could easily have done so and thus bolstered up immeasurably the flimsy case that was actually presented. There was no showing that petitioners had any improper motive for withholding these few records while producing all of the others. The inference is inescap-

able that they were not of crucial importance. For the Government to stay silent at the trial and then put this charge of concealing evidence on the public record of a *cause célèbre* justifies, we think, our emphatic protest.

4. **Government's Failure to Justify Arbitrary Timetable of District Court.** The Government does not advance any explanation or justification in its brief for the extraordinary timetable of the proceedings below. The Internal Revenue Service filed its petition for enforcement on Wednesday, December 3, 1958 (Vol. II, 3). Government counsel himself advised the District Court that it "has been our uniform practice" to afford "ten days notice", i.e., petitioners could not have been required to respond to an order to show cause until December 14, 1958 (Vol. II, 4-5). The District Judge, however, stating that "I have reasons for Friday" (Vol. II, 5), entered an order returnable *two* days later, on Friday, December 5, 1958 (*Ibid.*). At the conclusion of the hearings on Friday, the District Judge signed the "Interim Order" which required petitioners to produce the voluminous books and records involved by noon on Monday, December 8, 1958 (Vol. II, 110). The order was served upon petitioners the following day, Saturday, December 6, 1958 (Vol. I, 8-9, 17).

The Government does not even seek to defend the precipitate speed of the District Judge. Under any circumstances, an order requiring the production of a mass of corporate records within 48 hours, including Saturday and Sunday, would be deemed onerous and oppressive. We submit that the timing was not only so arbitrary that it nullifies the legality of the Interim Order (Pet. 21-23), but we also respectfully state that it is relevant in considering whether the District Judge

satisfied the standards of impartiality which are requisite in a case involving a charge that the accused has defied an order issued by the presiding judge himself.

5. **Government's Silence with Respect to Production of the Seven Records at Beginning of Trial.** The Brief in Opposition makes no reference to a most important fact which conclusively disproves any intent to defy the court. At the beginning of the trial on December 16, 1958, the District Judge stated that he would not "punish for criminal contempt a failure to deliver on the 8th if a delivery had taken place *by you*" (Vol. I, 77). At the very time the Court made that statement, the seven documents had been brought to court by petitioners' counsel for the purpose of compliance (see Vol. I, 156, 158). The fact was not called to the attention of the trial court until later in the proceedings. But the District Court did know before finding petitioners guilty that the documents had been produced, and that the time, manner and place of their production were the sole responsibility of counsel and not of petitioners.

The Court of Appeals refused to consider the affidavit of counsel for petitioners reciting these facts (R. 624-625). But the Government has made no objection to the consideration of that affidavit here. And on the basis of that affidavit any inference of wilful defiance of the court with respect to these documents is completely destroyed.

6. **Government's Avoidance of Jury Trial Issue.** The Government sidesteps the constitutional issue presented (Opp. Br. 13). The question presented by the record is not whether there is a right to trial by jury in every criminal contempt case. The issue is presented

here in a much narrower compass. Congress expressly declared that refusal to obey an Internal Revenue summons is a criminal offense (26 U.S.C. § 7210). In a prosecution for this offense, a defendant is entitled to a jury trial (*Brody* v. *United States*, 243 F. 2d 378, 381 (1st Cir. 1957)). The question thus presented here is, where Congress has provided a criminal sanction for certain conduct, and where a party would be entitled to a jury trial in any prosecution involving such conduct, may the right to trial by jury be denied by a contempt proceeding? That question, expressly left open by this Court in *Green* v. *United States*, 356 U.S. 165, is raised in the present case.

II

THE JUDGMENT OF THE COURT OF APPEALS IS VOID BECAUSE A NON-QUALIFIED JUDGE PARTICIPATED IN THE JUDGMENT.

1. At the time the petition for certiorari was filed in the present case, petitioners were unaware of facts appearing from the records of the Court of Appeals which we believe show that Judge Magruder was not qualified to sit or act as a member of the court. The relevant facts are set out in detail in the margin.[1] As

[1] This case was orally argued before the Court of Appeals on May 13, 1959. The Court of Appeals at that time consisted of Chief Judge Magruder and Circuit Judges Woodbury and Hartigan. Thereafter Chief Judge Magruder retired from the court, his retirement being effective on June 12, 1959. The judgment of the Court of Appeals affirming the judgment of the District Court was entered on July 24, 1959 (R. 623). The opinion of the Court of Appeals, issued on the same date (Pet. App. 14a), was written by Judge Magruder whose name appears at the head of the opinion as "Magruder, Circuit Judge (Retired)" (see 268 F. 2d 943). The records of the Court of Appeals disclose that at no time following his retirement was Judge Magruder designated or assigned either by the Chief Judge of the Court of Appeals for the First

we note, Judge Magruder participated in the decision and wrote the only opinion of the court, which was adverse to petitioners. His lack of qualification arose from the fact that he retired after oral argument in this case but before the opinion was filed and the judgment was entered. Subsequent to his retirement he was never lawfully designated or assigned to sit as a member of the court. The applicable statute, 28 U.S.C. § 295, expressly requires that "all designations and assignments of * * * judges shall be filed with the clerks and entered on the minutes of the courts from and to which made." The Clerk of the Court of Appeals for the First Circuit has informed counsel that no designation or assignment was filed and that none was entered on the minutes of the Court. Therefore, the decision of the court below consists in a judgment concurred in by two active judges and a retired judge not designated or assigned according to law.

2. We submit that the judgment by the Court of Appeals is void under the clear language of the controlling statutes.

Judge Magruder's participation contravenes the the plain terms of 28 U.S.C. § 294(c) which provides that "No retired justice or judge shall perform judicial duties except when designated and assigned." Under 28 U.S.C. § 43(b), a "court of appeals shall consist of the circuit judges of the circuit in active service." Retired judges who are "designated or assigned" within the circuit by the chief judge or judi-

Circuit or by the Judicial Council of the First Circuit to act as a judge of the Court of Appeals for that Circuit (see 28 U.S.C. §295). It may also be noted that Judge Magruder as well as Judges Woodbury and Hartigan participated in the decision of the Court of Appeals denying appellants' petition for rehearing on August 14, 1959 (R. 626).

cial counsel of the circuit in accord with 28 U.S.C. §§294, 295, are competent to sit as judges on a court or division of not more than three judges, but a judge who has not been so designated or assigned is precluded from "perform[ing] judicial duties". Since Judge Magruder was not designated or assigned, following his retirement on June 12, 1959, in conformity with these provisions, he was not qualified to write the opinion of the court or to participate in the decision, in the judgment, or in the proceedings on petitioners' application for a rehearing.

It cannot be argued that Judge Magruder's unauthorized presence was immaterial because under 28 U.S.C. § 46(d) a majority of the judges authorized to constitute a court may constitute a quorum. The participation of a non-qualified judge vitiates the entire proceeding and renders the judgment void. This is true because litigants are entitled to an opinion and judgment by qualified judges only. Cf. *Berkshire Employees Ass'n.* v. *National Labor Relations Board*, 121 F. 2d 235, 239 (3rd Cir.) (there is no way to measure influence of nonqualified judge upon qualified judges); see also *Narragansett Racing Ass'n.* v. *Kiernan*, 59 R. I. 90, 114, 194 A. 692, 701-702 (participation of disqualified member "vitiated the decision, though supported by a majority without counting him"). We do not believe a judicial decision is valid which consists solely in the concurrence of two active judges with an opinion reasoned out and written by a person not authorized to sit as a judge.

3. On October 13, 1959, subsequent to the filing of the petition for certiorari in the present case on September 11, 1959, this Court entered an order granting certiorari in *United States* v. *American-Foreign Steamship Corp. et al* (No. 138). The petition for certiorari

submitted by the Solicitor General in that case presents a jurisdictional question related to the issue arising from the jurisdictional facts we have noted above. In *American-Foreign Steamship Corp.*, the Government has urged this Court to decide "whether a circuit judge who retires prior to the decision of a court of appeals sitting on rehearing *en banc* is an 'active' circuit judge entitled to participate in the *en banc* decision under 28 U.S.C. 46(c)." (Petition for Certiorari, p. 2, *United States* v. *American-Foreign Steamship Corp. et al.*). The question presented here is whether, consistently with 28 U.S.C. §§ 43, 294, and 295, a circuit judge who retires prior to the decision by the Court of Appeals is qualified to participate in the decision and to write the opinion of the Court in the absence of any designation or assignment. In the light of the order by this Court granting the petition in No. 138, we believe it incumbent upon us to inform the Court that there is a jurisdictional defect in this case closely related to the one that will be argued in the *American-Foreign Steamship Corp.* case.[2]

In his petition in *American-Foreign Steamship Corp. et al.*, *supra*, the Solicitor General himself acknowledges that a formal designation under 28 U.S.C. § 296 is required to authorize a retired judge to sit. The Solicitor General represents to this Court as follows (Pet. for Cert., pp. 10-11):

> "Moreover, the powers conferred on retired judges under 28 U.S.C. 296 are solely those conferred by the Chief Judge of the circuit. Following his retirement, Judge Medina did not receive a designa-

[2] Questions involving the jurisdiction of the lower court will be considered here even though urged for the first time in this Court. *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 467. This Court will on its own initiative consider defects in the jurisdiction of the lower courts. *Mitchell* v. *Maurer*, 293 U.S. 237, 244.

tion and assignment in this case. Plainly, Chief Judge Clark did not purport in any way to invest Judge Medina with the power to participate in the *en banc* decision."

The Solicitor General also maintains (and we believe correctly) that "The issue is one of statutory interpretation; it is not a matter of discretion." (Pet. for Cert., p. 7, *United States* v. *American-Foreign Steamship Corp. et al.*) The foregoing contentions by the Solicitor General apply precisely to the present case.

We submit that the judgment by the Court of Appeals is void because rendered by an improperly constituted court, that certiorari should be granted, and the judgment should be reversed.

Respectfully submitted,

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